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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE MEDICAL and DENTAL STAFF
OF YORK HOSPITAL,

Petitioner,

v.

MALCOLM WEISS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a hospital medical staff, in discharging its legally mandated staff privileges functions, automatically a "combination" subject to scrutiny under section 1 of the Sherman Act?

2. Can a hospital medical staff's professional evaluation of, and recommendation to deny, a physician's application for staff privileges be deemed a per se illegal group boycott, when there has been no analysis of the nature, purpose, or effect of the alleged restraint?

3. Can a plaintiff establish antitrust jurisdiction and a violation of Sherman Act section 1 when there is no evidence that the alleged antitrust violation substantially affected interstate commerce?

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THE MEDICAL and DENTAL STAFF
OF YORK HOSPITAL,

Petitioner,

v.

MALCOLM WEISS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, The Medical and Dental Staff of York Hospital (the "York Medical Staff"), respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on September 27, 1984.[1]

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1. The York Medical Staff is now known as The Medical Staff of York Hospital. Other than the parties listed in the caption herein, York Hospital and ten individual physicians (S. Philip Laucks, M.D., Howard H. MacDougall, M.D., Iain L. MacKenzie, M.D., John P. Whitely, M.D., S. W. Deisher, M.D., Jack A. Kline, M.D., Lois M. Kushner, M.D., Ivan L. Butler, M.D., Gary Ardison, M.D., and Thomas L. Bauer, M.D.) were also defendants in the

OPINIONS BELOW

The opinion of the court of appeals, reported at 745 F.2d 786, appears in Appendix A, *infra* pp. A-1 to A-96. The opinion of the district court, reported at 548 F. Supp. 1048, appears in Appendix B, *infra* pp. A-97 to A-123.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Third Circuit were entered on September 27, 1984. (Appendix A, *infra* pp. A-1 to A-96; Appendix E, *infra* pp. A-127 to A-131). Petitioner's timely petition for rehearing and suggestion for rehearing in banc was denied on October 25, 1984 (Appendix F, *infra* pp. A-132 to A-133), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 15:

> **§ 1. Trusts, etc., in restraint of trade illegal; penalty**
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

NOTES *(Continued)*

action below. *See* Supreme Court Rule 21.1(b). Because York Hospital and the ten individual defendants were exonerated from any antitrust liability, they are not parties to this petition. *See* Supreme Court Rule 19.6.

STATEMENT OF THE CASE

I. Preliminary.

This is the first case to apply a per se liability rule in the hospital staff privileges context. It is the first case to hold that, as a matter of law, any action by a hospital medical staff constitutes a combination or conspiracy under section 1 of the Sherman Act. It is also the first case in which any court has decided, under any theory, that a hospital staff privileges decision is a violation of section 1 of the Sherman Act.[2]

II. Nature of the case.

Respondent Malcolm Weiss ("Weiss"), a doctor of osteopathy, filed this antitrust action on behalf of himself and a class of the 92 other osteopathic physicians practicing in and around York, Pennsylvania. Weiss sought treble damages and injunctive relief against York Hospital, the York Medical Staff, and ten individual physician members of the York Medical Staff, charging defendants with conspiring to deny osteopaths admission to the York Medical Staff and refusing to deal with Weiss and the class in violation of section 1 of the Sherman Act, 15 U.S.C. § 1.[3]

2. All other courts which have assessed the propriety of staff privileges determinations have applied a rule of reason analysis and, under that analysis, have found no antitrust violation. *E.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984); *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346 (7th Cir. 1982); *Vuciecevic v. MacNeal Memorial Hospital*, 572 F. Supp. 1424 (N.D. Ill. 1983); *Feldman v. Jackson Memorial Hospital*, 571 F. Supp. 1000 (S.D. Fla. 1983); *McElhinney v. Medical Protective Co.*, 549 F. Supp. 121 (E.D. Ky. 1982), *rev'd on other grounds*, 1984-1 Trade Cas. (CCH) ¶ 66,054 (6th Cir. 1984); *Everhart v. Jane C. Stormont Hospital & Training School for Nurses*, 1982-1 Trade Cas. (CCH) ¶ 64,703 (D. Kan. 1982); *Williams v. Kleaveland*, 534 F. Supp. 912 (W.D. Mich. 1981); *Robinson v. Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981), *aff'd mem.* 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982). *See also Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984); *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398, 2399 (1984); *Hospital Building Co. v. Trustees of the Rex Hospital*, 691 F.2d 678 (4th Cir. 1982), *cert. denied*, 104 S. Ct. 231, 259 (1983); *Hoffman v. Delta Dental Plan of Minnesota*, 517 F. Supp. 564 (D. Minn. 1981).

3. The district court had jurisdiction over Weiss's antitrust claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1337.

At issue was the alleged discriminatory manner in which defendants treated staff privileges applications submitted by osteopathic physicians. According to Weiss, this alleged discrimination resulted in the denial of his application for staff privileges. (The six other osteopaths who had completed their applications by the time of trial were all granted staff privileges.) It was the treatment and denial of Weiss's application that formed the sole basis for the injunctive relief entered by the district court in favor of Weiss and the class.

York Hospital and the ten individual physician defendants were exonerated from antitrust liability, leaving the York Medical Staff as the only party to the Sherman Act section 1 conspiracy.[4]

III. Factual background.

A. The treatment by York Hospital of osteopaths' applications for staff privileges.

Osteopathic (D.O.) and allopathic (M.D.) physicians have been separately schooled and licensed by the Commonwealth of Pennsylvania and other states. *See Weiss v. York Hospital*, 745 F.2d 786, 791-92 nn.1-4 (3d Cir. 1984) (Appendix A, *infra* pp. A-4 to A-6); American Osteopathic Association, *Yearbook and Directory of Osteopathic Physicians* 473 *et seq.* (75th ed. 1983-84); 3453a; 3806a-3808a.[5] In many communities, including York, osteopaths and allopaths traditionally maintained separate hospitals and the barriers separating the two schools of practice were mutual. *See Weiss*, 745 F.2d at 793 (Appendix A, *infra* p. A-9); 3453a. *See generally* American Osteopathic Association, *Accred-*

4. In processing Weiss's staff privileges application, the York Medical Staff acted through four of its committees (the Family Practice Department Credentials Committee, the Medical Staff Credentials Committee, the Medical Staff Executive Committee, and a Judicial Review Committee). Only the Executive Committee and the Judicial Review Committee recommended denial of Weiss's application. The ten individual physician defendants were the members of those two committees.

5. References in this form are to pages in the Joint Appendix filed in the court of appeals.

itation Requirements of the American Osteopathic Association 1, *passim* (1978).

As the differences in the schooling and training of osteopaths and allopaths narrowed, some hospitals that formerly had only allopaths on their medical staffs took steps to integrate the two types of practitioners. (3453a, 3630a-3631a). As part of this trend, York Hospital in 1974 voluntarily amended its corporate charter to permit osteopaths to obtain staff privileges. (3810a-3811a). In 1976, the York Medical Staff similarly amended its bylaws. (3813a-3814a; 4024a-4025a).

Weiss and Michael Zittle, D.O. ("Zittle") were the first two osteopaths to seek staff privileges at York Hospital, both applying in 1976. Although these initial osteopathic applications were processed more carefully than applications by allopaths, this "caution" (4162a) (or, according to Weiss, "discrimination") was dictated by York Hospital's and the York Medical Staff's relative unfamiliarity with the educational and training backgrounds of osteopathic applicants and their references. As Merle S. Bacastow, M.D., Vice-President of Medical Affairs at York Hospital and the official responsible for processing applications for staff privileges, explained at trial:

> [A]dmitting osteopathic physicians to the York Hospital medical staff was a new venture . . . . We were going to be admitting additional osteopathic physicians to the staff and we were using new resources of information.
>
> I was unfamiliar with the osteopathic schools in some of these specifics. I was unfamiliar with osteopathic hospitals generally. I was unfamiliar with many of the people who would be serving as referral information.

(5240a-5241a).

Within this framework, Weiss's application was considered.[6] (1542a-1555a). References were gathered, and information crit-

6. York Hospital's consideration of Weiss's application included all the due process protections normally accorded applications for staff privileges at York Hospital, including numerous meetings at which Weiss and/or his legal counsel were present and participated and at which numerous votes were taken. *See Weiss*, 745 F.2d at 796-99. (Appendix A, *infra* pp. A-15 to A-22).

ical of Weiss's medical competence and ability to work with others in a hospital setting was received from osteopaths and allopaths. For example, Kenneth F. Woerthwein, M.D., wrote that Weiss's patients complained about his medical treatment and that Woerthwein "would have strong concern regarding his [Weiss's] medical abilities and competence." (5911a). And Roy O. Kammer, D.O., a fellow osteopath, wrote in his reference letter:

> I have known Dr. Malcolm Weiss for four years. He was not popular during his internship and seemed to perform his duties grudgingly.
>
> There was ambivalence concerning his staff membership at Memorial Osteopathic Hospital [the osteopathic hospital in York] and it took three meetings and much debate before his acceptance. . . .
>
> He served as a paid member of the Emergency Room Staff. He related so badly to people of the lower socioeconomic class that on occasion he was physically attacked by patients and family members. He demanded police protection or the right to arm himself. The administration felt this lack of rapport was his fault and terminated his contract.

(5909a-5910a).

In view of these critical comments and others, and taking into account the negative recommendation of the York Medical Staff, York Hospital's lay Board of Directors unanimously voted to deny Weiss's application for staff privileges because of the Board's concerns about Weiss's "uncooperative nature" and about the adverse impact his appointment would have on the quality of patient care at York Hospital. (1691a-1693a). As Donn I. Cohen, Esquire, then chairman of York Hospital's Board of Directors, explained in his deposition testimony:

> There were concerns expressed apparently in terms of patient care, quality, and also in terms of the impact of Dr. Weiss on the operations of the hospital and, in turn, how that would affect the quality and efficacy of the care of patients. . . .

. . . .

. . . And our concern is not only with fairness to Dr. Weiss, albeit that's a major concern and an important concern. Our concern is also with patient care and the impact of his admission to the hospital's attending staff on the quality of care at the hospital.

(2067a; 2091a).

Staff privileges were granted to Zittle on the same day Weiss's application was denied. Including Weiss and Zittle, until the time of trial in this case, seven osteopaths had completed applications for staff privileges at York Hospital; six were accepted, while only Weiss was turned down. *Weiss v. York Hospital*, 548 F. Supp. 1048, 1053 (M.D. Pa. 1982) (Findings of Fact Nos. 36-40). (Appendix B, *infra* pp. A-102 to A-103).

B. The organization, purpose, and operation of the York Medical Staff.

Federal regulations, national accreditation organization standards, and state regulatory schemes in 49 states, including Pennsylvania, and the District of Columbia require hospitals to have organized medical staffs like the York Medical Staff. *See* 42 C.F.R. §§ 405.1021(a)(2)(v), 405.1021(e), 405.1023 (1984) (Appendix G, *infra* pp. A-136 to A-137); Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals* (Governing Body and Medical Staff Standards) (hereinafter cited as *"JCAH Manual"*) (Appendix H, *infra* pp. A-142, A-145); 28 Pa. Code §§ 101.31(3), 107.1 (1984) (Appendix I, *infra* pp. A-153, A-158); Appendix J, *infra* pp. A-163 to A-175 (Summary of State Regulation of Hospital Medical Staffs). These regulatory provisions also require physicians authorized to care for hospital patients on a regular basis to be members of the hospital medical staff.

Medical staffs are required by law and national accreditation organization standards to be organized to serve the interests of the hospital and its patient population. Hospital boards of directors are compelled to delegate certain hospital functions to medical staffs and the medical staffs are required to be accountable to the hospital board of directors and to be part of the overall hos-

pital organization.[7] *See* 42 C.F.R. §§ 405.1021(d), 405.1023 (1984) (Appendix G, *infra* pp. A-136 to A-141); *JCAH Manual, supra* p. 7 (Appendix H, *infra* pp. A-142 to A-151); 28 Pa. Code §§ 101.4, 103.3, 103.4, 107.1, 107.5, 107.12(13) (1984) (Appendix I, *infra* pp. A-153, A-155 to A-162); Appendix J, *infra* pp. A-163 to A-175 (Summary of State Regulation of Hospital Medical Staffs).

One of the functions required of the medical staff, and for which the medical staff is accountable to the hospital board of directors, is participation (through the medical staff's individual physician members)[8] in the staff privileges decision-making process.[9] *See* 42 C.F.R. §§ 405.1023(d), 405.1023(e), 405.1023(l) (1984) (Appendix G, *infra* pp. A-138 to A-140); *JCAH Manual, supra* p. 7 (Appendix H, *infra* pp. A-142 to A-143, A-146 to A-151); 28 Pa. Code §§ 103.4.(9), 107.2, 107.5, 107.12 (1984) (Appendix I, *infra* pp. A-157 to A-162); Appendix J, *infra* pp. A-163 to A-175 (Summary of State Regulation of Hospital Medical Staffs). Federal regulations, national accreditation organization standards, and state regulatory schemes in at least 43 states, including Pennsylvania, thus require medical staffs to advise, and make recommendations to, the hospital board of directors respecting the board's staff privileges decisions.

The ultimate authority and responsibility for all hospital staff privileges decisions is vested with the hospital board of directors pursuant to law and national accreditation organization standards. *See* 42 C.F.R. §§ 405.1021, 405.1021(e), 405.1023, 405.1023(d), 405.1023(e), 405.1023(m) (1984) (Appendix G, *infra*

7. The York Medical Staff Bylaws similarly provide that the purpose of the York Medical Staff is to foster the interests of York Hospital and the community it serves. (1559a-1560a).

8. The participation of individual physician members of the medical staff in hospital staff privileges decisions is mandated by law and national accreditation organization standards. *See* 42 C.F.R. §§ 405.1023(e), 405.1023(l) (1984) (Appendix G, *infra* pp. A-138 to A-140); *JCAH Manual, supra* p. 7 (Appendix H, *infra* pp. A-147 to A-151); 28 Pa. Code § 107.26 (1984) (Appendix I, *infra* p. A-162).

9. Staff privileges decisions (which are also referred to in this petition as credentialing decisions) include decisions granting, limiting, and terminating staff privileges, thereby determining whether a physician will be permitted to admit and treat patients in the hospital.

pp. A-135 to A-141); *JCAH Manual*, *supra* p. 7 (Appendix H, *infra* pp. A-142 to A-151); 28 Pa. Code §§ 103.1, 103.3(8), 103.4, 107.2, 107.5, 107.12(13) (1984) (Appendix I, *infra* pp. A-155 to A-162); Appendix J, *infra* pp. A-163 to A-175 (Summary of State Regulation of Hospital Medical Staffs).[10]

Consistent with this legally mandated structure of staff privileges decision-making (and the York Medical Staff Bylaws),[11] the York Medical Staff processed Weiss's application for staff privileges and, ultimately, through its Executive Committee and a Judicial Review Committee, recommended to York Hospital's lay Board of Directors that Weiss's application be denied. After reviewing the York Medical Staff's recommendation, the Board made the decision to deny Weiss's application. *See Weiss*, 745 F.2d at 797-99. (Appendix A, *infra* pp. A-16 to A-22).

IV. Conclusions of the courts below.

A. The district court.

Following a bifurcated jury trial on liability and a hearing on equitable relief, the district court entered its opinion, order, and judgment. (These are reported at 548 F. Supp. 1048 and reproduced in Appendix B, *infra* pp. A-97 to A-123.) The district court concluded that the York Medical Staff alone was liable to the class (but not Weiss)[12] under section 1 of the Sherman Act and the court entered injunctive relief in favor of the class.

10. Hospitals have no choice but to follow all of these regulatory requirements. Failure to comply can lead to a cutoff of all governmental funds. *See, e.g.*, 42 C.F.R. §§ 405.1011, 405.1020 (1984) (Appendix G, *infra* pp. A-134 to A-135); 28 Pa. Code §§ 101.81, 101.141, 101.142 (1984) (Appendix I, *infra* p. A-154). Such a cutoff of funds would be disastrous for most hospitals, as more than half of all hospital costs are paid by governmental entities. *See* Gibson, Waldo & Levit, *National Health Expenditures, 1982*, 5 Health Care Financing Rev. 1, 19 (1983).

11. The York Medical Staff Bylaws provide that the Staff's Credentials Committee, Executive Committee, and Judicial Review Committee are to review staff privileges applications and to recommend action to the York Hospital Board of Directors, which is to make the "definitive" decision. (1562a-1563a).

12. The absence of any Sherman Act section 1 liability to Weiss was based upon the jury's finding that any conspiracy to deny Weiss staff privileges did not "constitute an unreasonable restraint upon interstate commerce." Jury's Response to Special Verdict Question No. 8. (6244a).

The district court held the York Medical Staff liable to the class on the basis of the jury's answers to Special Verdict Questions Nos. 11 (6247a) and 13 (6250a):

> 11. Did any of the Defendants conspire with any other person or persons, entity or entities, whether or not a Defendant, to deny or impede reasonable, fair, equal or full access to staff privileges at York Hospital by osteopathic physicians other than Plaintiff Weiss?
>
> Answer: Yes X
> No ____
>
> . . . .
>
> 13. If your answer to the previous question is "yes," check the name or names of the Defendants listed below who were involved in that conspiracy.
>
> | | |
> |---|---|
> | York Hospital | ____ |
> | York Hospital Medical and Dental Staff | X |
> | Gary Ardison, M.D. | ____ |
> | Thomas L. Bauer, M.D. | ____ |
> | Ivan L. Butler, M.D. | ____ |
> | S.W. Deisher, M.D. | ____ |
> | Jack A. Kline, M.D. | ____ |
> | Lois Kushner, M.D. | ____ |
> | S. Philip Laucks, M.D. | ____ |
> | Harold H. MacDougall, M.D. | ____ |
> | Iain L. MacKenzie, M.D. | ____ |
> | John P. Whiteley, M.D. | ____ |

B. The court of appeals.

On September 27, 1984, a two-judge panel[13] of the United States Court of Appeals for the Third Circuit affirmed the entry of an injunction in favor of the class (including Weiss as a member of the class) and against the York Medical Staff under section 1 of the Sherman Act. (The court of appeals' opinion is reported

13. One of the three original members of the panel, Circuit Judge Adams, recused after oral argument and did not participate in the decision.

at 745 F.2d 786 and reproduced in Appendix A, *infra* pp. A-1 to A-96.)[14]

With respect to conspiracy, the court of appeals agreed with the district court that the York Medical Staff and York Hospital were a single entity incapable of conspiring with each other for purposes of Sherman Act section 1. *Weiss*, 745 F.2d at 816-17. (Appendix A, *infra* pp. A-62 to A-63). The court of appeals also found an "absence of evidence" of any co-conspirators who might have acted in concert with the York Medical Staff. *Id.* at 814. (Appendix A, *infra* p. A-58).

Nonetheless, the court of appeals labeled this heretofore fatal defect "irrelevant," holding that "as a matter of law, the medical staff is a combination of individual doctors and therefore . . . any action taken by the medical staff satisfies the 'contract, combination, or conspiracy' requirement of section 1." *Id.* The court thus determined that the York Medical Staff (and, *a priori*, the medical staff of every other hospital in the United States) is necessarily a combination "subject to scrutiny under section 1 of the Sherman Act." *Id.* at 816. (Appendix A, *infra* p. A-61).

The court's conclusion was not based upon any finding or evidence that, in their credentialing capacity, the York Medical Staff or any of its individual members acted otherwise than in the interests of York Hospital. Indeed, in response to the district court's instruction that the ten individual York Medical Staff members were legally capable of conspiring if they took action against the class "in whole or in part in their individual capacities and motivated in whole or in part by independent personal economic interests" (5686a), the jury found that none of the individual defendants conspired against the class.

Having posited a Sherman Act section 1 conspiracy, the court of appeals then held that, although staff privileges had been granted to all osteopaths (other than Weiss) who had completed their applications, and notwithstanding the legitimate question about Weiss's qualifications for staff membership, the discrimi-

14. After issuing its opinion, the court of appeals both stayed the issuance of its mandate (Appendix C, *infra* p. A-124) and stayed the effectiveness of the district court's injunction (Appendix D, *infra* pp. A-125 to A-126) pending this Court's review of this petition.

nation at issue was "the equivalent of a concerted refusal to deal" or group boycott and was consequently per se illegal under Sherman Act section 1. *Weiss*, 745 F.2d at 818, 821. (Appendix A, *infra* pp. A-67, A-74).

In reaching for this conclusion, the court of appeals acknowledged that "the facts of this case do not precisely fit into the mold of the classical refusal to deal" and that arguably "what is at issue is not a boycott but mere discrimination, which sounds less like a *per se* antitrust violation." *Id.* at 819-20. (Appendix A, *infra* p. A-69). The court of appeals nevertheless resorted to the mechanistic application of the "group boycott" label and the conclusory statement that group boycotts are "plainly anticompetitive." *Id.* at 820. (Appendix A, *infra* p. A-70).

The court of appeals did not undertake any analysis of any anticompetitive purposes or effects of the alleged antitrust restraint. The court did not evaluate the distinctions between the health care industry (particularly nonprofit hospitals) and the industries in which the per se rule against group boycotts is traditionally applied.[15] Nor did the court recognize the procompetitive justifications for the alleged discrimination.[16]

REASONS FOR GRANTING THE WRIT

I. This case presents certain questions respecting administration of the antitrust laws which are before this Court in *Northwest Wholesale Stationers, Inc.*

The court of appeals' unwarranted extension of the limits of antitrust liability occurs at a time when, rather than charting new frontiers of antitrust exposure, this Court and other courts of appeals have expressed concern with the scope of existing theories of antitrust liability. *See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984); *Monsanto Co. v.*

15. As one court has put it, "a hospital is a complex business vitally affected with a public interest." *Belmar v. Cipolla*, 96 N.J. 199, 207, 475 A.2d 533, 537 (1984).

16. The court of appeals incongruously left for the damage phase of the trial the defenses of Weiss's and the class's lack of professional capacity or unprofessional conduct. *Weiss*, 745 F.2d at 821-22. (Appendix A, *infra* pp. A-73 to A-74).

Spray-Rite Service Corp., 104 S. Ct. 1464 (1984); *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973 (1st Cir. 1984). The court of appeals' expansive decision has serious jurisprudential ramifications, certain of which this Court recognized when it decided to review *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 77 (1984).

In *Northwest Wholesale Stationers, Inc.*, the court of appeals, relying in part on *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), held that a member of a cooperative association who was expelled without due process protections, was the subject of a group boycott that was per se illegal under section 1 of the Sherman Act. This Court granted certiorari to review, *inter alia*, whether a finding of a per se violation of the antitrust laws could be made without a minimum scrutiny of the purpose and effect of the alleged restraint.

In this case, as in *Northwest Wholesale Stationers, Inc.*, the court of appeals adopted and applied a per se liability rule without any analysis of the purpose or effect of the alleged restraint. The court here went even further than the Ninth Circuit in *Northwest Wholesale Stationers, Inc.*, by concluding that the York Medical Staff was a section 1 combination without any finding or showing that the York Medical Staff or any of its members acted otherwise than in the interests of York Hospital.[17]

II. The decision of the court of appeals has drastic implications for hospitals seeking to provide cost-effective, high quality patient care.

More is at stake in this case than the rights and interests of the litigants. Although this is a lawsuit concerning a single hospital in central Pennsylvania, the court of appeals' adoption of a "double per se" analysis — that is, first, to rule as a matter of law

17. Insofar as this Court's review of *Northwest Wholesale Stationers, Inc.*, focuses on whether self-regulatory activities by associations that might be condemned as per se illegal group boycotts in other contexts should be assessed under the rule of reason, this case also presents issues similar to those that the Court will be deciding in *Northwest Wholesale Stationers, Inc.* *See infra* pp. 26-27.

that medical staffs are "combinations" under the antitrust laws and, next, to superimpose thereon the "group boycott" label without any analysis of the purpose or effect of the alleged restraint — will profoundly alter the functions, operations, and competitive strategies of the more than 7,000 hospitals in the United States.[18]

No hospital can function efficiently, competently, or competitively when every staff privileges recommendation by its medical staff is reviewable under antitrust standards by a federal jury. By foreclosing the availability of the summary relief that heretofore had provided important protection to hospitals and medical staffs against baseless antitrust claims, and by creating a virtually irrebutable presumption of antitrust liability, the court of appeals has dramatically and adversely affected national health policy in at least the following critical respects:

A. Increase in costs.

To date, courts have refused to apply section 1 of the Sherman Act to staff privileges cases, and defendants in such cases have been able to extricate themselves relatively promptly, in the absence of an affirmative showing by the plaintiff physician of (i) an antitrust conspiracy or combination, and (ii) an unreasonable restraint of trade. *See, e.g., Stone v. William Beaumont Hospital*, 1983-2 Trade Cas. (CCH) ¶ 65,681 (E.D. Mich. 1983); *Williams v. Kleaveland*, 1983-2 Trade Cas. (CCH) ¶ 65,486 (W.D. Mich. 1983); *Pontius v. Children's Hospital*, 552 F. Supp. 1352 (W.D. Pa. 1982); *Moles v. Morton F. Plant Hospital, Inc.*, 1980-81 Trade Cas. (CCH) ¶ 63,600 (M.D. Fla. 1978), *aff'd mem.* 617 F.2d 293 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980).

By eliminating the need to prove concerted action and an unreasonable restraint of trade, the court of appeals has foreclosed summary disposition to defendants in cases challenging staff privileges decisions and has unwittingly provided every phy-

18. The American hospital system is dominated by nonprofit/governmental providers. Thus, in 1981, there were a total of 7,027 hospitals in the United States, of which 86.5 percent were either nonprofit (like York Hospital) or government controlled. United States Department of Commerce, *Statistical Abstract of the United States: 1984* 112 (104th ed. 1983).

sician aggrieved by a staff privileges decision with the certain knowledge that all staff privileges disputes can be heard as an antitrust case by a federal jury. The court of appeals' decision thus demonstrates a complete disregard of the "heavy costs of federal litigation, especially antitrust litigation,"[19] *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984), and of the impact of these substantial non-health care costs on the ability of nonprofit hospitals to provide quality health care, to augment revenues through voluntary contributions and other fund raising efforts, and to avoid "increased medical costs to the consumer." *Marrese v. Interqual, Inc.*, 748 F.2d 373, 394 (7th Cir. 1984).

A recent survey by the American Hospital Association underscores the national implications of the issues raised in this petition.[20] Each hospital surveyed received an average of 15.8 applications for staff privileges during 1981, and each rejected an average of 1.3 applications. On a national basis, this projects out to more than 9,000 applications for staff privileges being rejected in the United States in 1981.

Even before the decision in this case, the federal courts were ensnarled in a "deluge" of antitrust litigation brought by ostensibly aggrieved physicians challenging staff privileges determinations. *Marrese*, 748 F.2d at 381. The court of appeals' decision now makes such litigation irresistably inviting to even more of the thousands of physicians whose applications for staff privileges

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19. Even *winning* an antitrust suit challenging the denial of staff privileges can be prohibitively expensive. For example, in the case of *Robinson v. Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981), *aff'd mem.* 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982), Allegheny General Hospital was forced to expend in excess of $2 million to defeat a single cardiothoracic surgeon's challenge to the hospital's decision to deny him staff privileges. *See* Levin, *Doctors Sue Hospitals For Staff Privileges As Competition Rises*, Wall St. J., Sept. 29, 1981, at 1, col. 1, 19, col. 2.

20. In September 1982, the American Hospital Association conducted a mail survey of more than 3,000 randomly selected hospitals in the 48 contiguous states and the District of Columbia. The results of the survey were reported in the December 1, 1983 (pp. 80-84) and December 16, 1983 (pp. 91-94) issues of *Hospitals* magazine.

are rejected each year.[21] A ruling by this Court at this time on the issues in this petition, therefore, is essential to assure the effective functioning of hospitals and medical staffs and the orderly consideration and disposition by the lower federal courts of hospital staff privileges cases.

B. Decrease in quality of care.

The *in terrorum* effect of the court of appeals' decision on hospitals, medical staffs, and individual physicians is incalculable.[22] At the very least, by discouraging physicians from participating in the credentialing process and honestly and critically evaluating their peers, the court of appeals' decision threatens the capacity of hospitals to regulate the quality of their medical staffs.

This very point was made by the Seventh Circuit in the most recent court of appeals decision in a hospital staff privileges case:

> It is only logical that physicians . . ., when presented with allegations of Federal antitrust violations and the threat of treble damages, will either dilute their peer review reports and cease recommending the revocation of a hospital staff member's privileges or will discontinue their participation in the state mandated and supervised peer review process. As a result, the very lifeline of the medical peer review process will be severed.

Marrese, 748 F.2d at 391. The Seventh Circuit thus concluded that permitting antitrust scrutiny of hospital credentialing decisions "will destroy the medical peer review process and prevent

21. Expansive application of the antitrust laws in the hospital staff credentialing context is also significant in view of the nationwide movement to admit to hospital staffs various classes of "nonphysician practitioners," including podiatrists, clinical psychologists, nurse midwives, psychiatric social workers, and other allied health professionals. *See* American Hospital Association, *An Analysis of the Revised Medical Staff Standards of the Joint Commission on Accreditation of Hospitals* 1 (1984).

22. The *in terrorum* effect on physicians results from the substantial disruption that inheres in federal antitrust litigation and from the fear of criminal felony sanctions, treble damages, injunctive relief and concomitant contempt threats, and attorneys' fees.

hospitals from fulfilling their duty to provide patients with a competent medical staff." *Id.* at 394.

The court in *Pontius* reached a similar conclusion:

> If a physician, terminated from hospital privileges after receiving due process, is able to force the hospital to assume the burdens of an antitrust trial on the mere allegation that the hospital's decision was grounded on reasons violative of the Sherman Act, the ability of hospitals to regulate their medical staffs will be seriously impaired. Furthermore, if *individual* physicians, who manage to overcome their traditional reluctance to testify about the professional conduct of a colleague, know that by so doing they risk incurring legal fees running into six figures and a trial of a duration measured in months, on the mere allegation that they have conspired to restrain trade, the discovery of incompetent physicians will be rendered extraordinarily difficult.

Pontius, 552 F. Supp. at 1362 (emphasis in original).

By deterring physicians from participating and exercising their expert judgment in the hospital credentialing process, the court of appeals' opinion undermines the national policy favoring meaningful and active physician involvement in that process.[23] As courts have recognized, because "[h]uman lives are at stake," the "evaluation of the professional proficiency of doctors is best left to the specialized expertise of their peers," *Sosa v. Board of Managers of the Val Verde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir. 1971), and, therefore, physicians must be involved

23. This national policy not only can be found in the federal and state regulatory schemes discussed earlier, *see supra* pp. 7-9, but it also underlies federal and state statutory encouragement and protection of physician peer review proceedings and of the participants in those proceedings. *E.g.*, 42 U.S.C. §§ 1320c to 1320c-12, 1395x(k), 1396a(a)(26); Pa. Stat. Ann. tit. 63, §§ 425.1-425.4 (Purdon Supp. 1984).

This national policy is supported by the recent studies concluding that there is a direct, quantifiable link between active physician involvement in all significant hospital decisions (including credentialing decisions) and cost containment and the quality of patient care at the hospital. *See* Institute of Medicine, *The New Health Care for Profit: Doctors and Hospitals in a Competitive Environment* 90-92 (1983) (citing numerous studies).

in hospital credentialing decisions. *Marrese*, 748 F.2d at 391, 394; *Pontius*, 552 F. Supp. at 1376.[24]

III. The decision of the court of appeals is wrong as a matter of law.

Aside from the implications the court of appeals' decision has for the health care industry, the decision is wrong as a matter of law and seriously affects the administration of the antitrust laws.

A. The conclusion that the York Medical Staff necessarily is a "combination" under Sherman Act section 1 is contrary to decisions of this Court and other courts of appeals.

In light of the "absence of evidence" of any co-conspirators with the York Medical Staff, to find a Sherman Act violation, the court of appeals was forced to decide that the York Medical Staff "as a matter of law" was an antitrust combination satisfying the concerted action requirement of section 1 of the Sherman Act. *Weiss*, 745 F.2d at 814-17. (Appendix A, *infra* pp. A58-A63). This conclusion is legally unsupportable because: (i) it was not premised upon a finding or evidence that the York Medical Staff (or any of its individual members) acted otherwise than in the interests of York Hospital; and (ii) all staff credentialing decisions were made "unilaterally" by York Hospital's lay Board of Directors.

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24. The consequences discussed *supra* at pages 13 to 18 can be avoided while still affording protection to the physician who wishes to challenge a staff privileges decision. As the courts in *Marrese* and *Pontius* recognized, existing professional standards and state law procedures more than adequately protect the interests of the complaining physician. *Marrese*, 748 F.2d at 393; *Pontius*, 552 F. Supp. at 1376. *See also Early v. Bristol Memorial Hospital, Inc.*, 508 F. Supp. 35, 37 (E.D. Tenn. 1980); Appendix J, *infra* pp. A-163 to A-175 (Summary of State Regulation of Hospital Medical Staffs). Moreover, the existing professional standards and state law procedures are better suited for regulating staff privileges decisions than are the antitrust laws, which were never designed to be applied to such decisions.

1. The physician members of the York Medical Staff when performing credentialing functions are agents of York Hospital and cannot be presumed to be antitrust conspirators.

The court of appeals correctly decided that, in the staff privileges process, the York Medical Staff "operated as an officer of a corporation would in relation to the corporation." *Weiss*, 745 F.2d at 817. (Appendix A, *infra* p. A-63). The court of appeals, accordingly, concluded that York Hospital could not conspire with its own Medical Staff for purposes of section 1 of the Sherman Act. *Id.* (Appendix A, *infra* pp. A-62 to A-63). This conclusion is dictated by this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984), as is the effect of such a holding — that York Hospital and its Medical Staff are a "single enterprise for purposes of § 1 of the Sherman Act." *Id.* at 2742.

In performing credentialing functions, the members of the York Medical Staff are required to have an identity of interest with their "single enterprise" as do corporate officers with their corporation. *See supra* pp. 7-9. This Court has already stated that "officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." *Copperweld Corp.*, 104 S. Ct. at 2741. Accordingly, the members of the York Medical Staff, when engaged in credentialing activities, do not provide the requisite plurality of actors and are, therefore, incapable of concerted action under section 1 of the Sherman Act.

In such a context, for Weiss to have demonstrated concerted action, he would had to have invoked the "independent personal stake" exception and sustained the burden of showing that identifiable individuals had acted for their own interests and outside the interests of York Hospital. *See, e.g., id.* at 2741 n.15; *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974); *Johnston v. Baker*, 445 F.2d 424, 426-27 (3d Cir. 1971). Yet, there is no finding or evidence that in the credentialing process any member of the York Medical Staff acted for his or her personal interests and outside the interests of York Hospital. *See Weiss*, 745 F.2d at 813 n.43. (Appendix A, *infra* p.

A-54). Indeed, as to the ten individual defendants, the jury specifically found that they had not acted for their personal interests or in their individual capacities. *See supra* pp. 10-11.

Thus, the court of appeals could not, and did not, rely upon the "individual personal stake" exception, *Weiss*, 745 F.2d at 813 n.43 (Appendix A, *infra* p. A-54), and, under the intra-enterprise conspiracy doctrine, the York Medical Staff could not constitute an antitrust combination. Other courts considering this issue have so concluded. *E.g.*, *McMorris v. Williamsport Hospital*, 1984-2 Trade Cas. (CCH) ¶ 66,252 (M.D. Pa. 1984). *See also Seglin v. Esau*, 1984-1 Trade Cas. (CCH) ¶ 65,835 (N.D. Ill. 1984); *Stone*, 1983-2 Trade Cas. (CCH) at 69,480; *Moles*, 1980-81 Trade Cas. (CCH) at 77,188; *Sokol v. University Hospital, Inc.*, 402 F. Supp. 1029, 1030 (D. Mass. 1975).

In support of its conspiracy conclusion, the court of appeals relied upon several "cooperative venture" cases, including *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), and *Associated Press v. United States*, 326 U.S. 1 (1945). *See Weiss*, 745 F.2d at 815-16. (Appendix A, *infra* pp. A-59 to A-61). The cooperative venture cases, however, are inapposite to this case.

These cases involve "cooperative ventures among otherwise competing entities" with "disparate objectives" organized to foster the separate economic interests of the individual members rather than the interests of a common single enterprise. *See Associated Press*, 326 U.S. at 15. In contrast, medical staffs are not organized to advance the individual competitive positions of their members; medical staffs are organized pursuant to federal and state law to serve the interests of the hospital and its patient population. *See supra* pp. 7-9.[25]

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25. In addition, the members of the medical staff have different medical specialties (*e.g.*, surgery, family practice, radiology, obstetrics and gynecology) and, contrary to what the court of appeals assumed, physicians in different specialties do not compete against each other for patients. Indeed, because general practitioners are a prime source of patient referrals, it is in the economic interest of certain specialists who depend largely upon patient referrals (*e.g.*, radiologists) for there to be as many general practitioners (such as Weiss) on the medical staff as possible. *See* Robert Wood Johnson Foundation, *Medical Practice in the United States* (1981); 5092a-5097a.

Also, unlike the cooperative ventures relied upon by the court of appeals, medical staffs are organized to accomplish societally beneficial purposes that cannot be achieved except through concerted action. *Cf.* Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich. L. Rev. 1, 21-22 (1983) (arguing that a business composed of multiple entities is a single enterprise incapable of Sherman Act section 1 concerted action when it produces a product that its component entities are incapable of producing alone). Moreover, one of the critical underpinnings of the cooperative venture cases — that the members' *voluntary agreement* to join the organization removes the necessity of an express finding of agreement when the organization acts — is wholly lacking for medical staffs, whose existence, functions, and membership are required by law.[26]

2. Credentialing decisions are made unilaterally by hospital boards of directors.

Even assuming *arguendo* that the York Medical Staff could be deemed a "combination," there is still no "concerted action" in this case. The record is uncontradicted that it was York Hospital (through its Board of Directors) that was the decision maker

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26. The legally mandated existence and functions of the York Medical Staff under Pennsylvania law, *see* Pa. Stat. Ann. tit. 63, §§ 425.1-425.4 (Purdon Supp. 1984) (Peer Review Protection Act); 28 Pa. Code pt. IV (1984) (hospital and medical staff regulations) (excerpted in Appendix I, *infra* pp. A-152 to A-162), suggest an independent ground for reversing the court of appeals' finding of liability against the York Medical Staff — application of the state action doctrine. Under decisions of this Court, even plainly anticompetitive conduct undertaken pursuant to a "clearly articulated and affirmatively expressed state policy," which policy is "actively supervised" by the state, is *exempt* from antitrust scrutiny. *E.g.*, *Hoover v. Ronwin*, 104 S. Ct. 1989, 1995 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). In fact, the Seventh Circuit has concluded that the state action doctrine bars federal antitrust scrutiny of hospital staff privileges decisions when there is a comprehensive state system in place to regulate such decisions. *Marrese*, 748 F.2d at 387-95.

in the staff privileges process (as required by law).[27] In light of the jury's unequivocal finding that the decision maker (York Hospital) did not conspire with anyone, the concerted action requirement of Sherman Act section 1 cannot be satisfied. *Monsanto Co.*, 104 S. Ct. at 1469-71; *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110-11 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

B. The decision of the court of appeals to apply a per se rule to a hospital's credentialing process is contrary to decisions of this Court and other courts of appeals.

The court of appeals also concluded that the staff privileges activities in this case should be subjected to a per se analysis because they were the equivalent of a "concerted refusal to deal" or "group boycott." *Weiss*, 745 F.2d at 818. (Appendix A, *infra* p. A-67). In so extending the per se rule, the court of appeals failed to observe the standards required by this Court for the creation of a new per se rule.

As this Court has warned, "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972). Also, any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977). This mandatory economic analysis is equally essential when extending an established per se rule into a new context. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

Morever, per se rules under the antitrust laws are reserved for conduct that is deemed to have only "pernicious effects" on competition without "any redeeming virtue." *E.g., Continental*

27. Although the York Medical Staff played an advisory role in the staff privileges process (1562a-1563a), there is no evidence that the York Hospital Board was not the decision maker or that the York Medical Staff controlled the Board's staff privileges decisions at York Hospital. *See infra* note 28.

T.V., Inc., 433 U.S. at 50 (citing *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958)).

1. Credentialing activities are not group boycotts.

The court of appeals sought to justify its new per se rule by forcing the York Hospital staff privileges process into the pre-existing group boycott or refusal to deal paradigm, while recognizing that the facts of this case do not precisely fit into that mold. *Weiss*, 745 F.2d at 819-20. (Appendix A, *infra* p. A-69).

Actionable refusals to deal must involve proof that businesses at one level of the competitive chain (e.g., physicians) used the threat of a boycott to induce businesses at another level (e.g., a hospital) not to deal with the physicians' competitors. *See Weiss*, 745 F.2d at 819. (Appendix A, *infra* p. A-67). Here, there was no evidence that any allopathic physicians (let alone allopathic physicians who were actual competitors of any osteopathic applicant for staff privileges) coerced the Board of Directors of York Hospital into refusing to deal with osteopathic physicians.[28] *See id.* at 819. (Appendix A, *infra* p. A-68). Accordingly, application of the "group boycott" label is improper.

2. The court of appeals' new per se rule was unsupported by any economic analysis.

The court of appeals also neglected to undertake any analysis of any adverse economic effects of the purportedly illegal conduct. (Whether a finding of per se liability is justified without even minimum scrutiny of purpose and effect is one of the questions this Court will review in *Northwest Wholesale Stationers, Inc.*) In the absence of such an analysis, this Court has repeatedly said it will not tolerate the creation of new per se rules or the extension of existing per se rules into new contexts.

28. Recognizing this, the court of appeals assumed that allopathic physicians have control over York Hospital's staff privileges decisions, which the court considered the functional equivalent of the coercion normally present in group boycott cases. *See Weiss*, 745 F.2d at 819 n.57, 819. (Appendix A, *infra* pp. A-67 to A-69). There is no evidence supporting this assumption and instead, the court was forced to rely upon two law review articles. *Id.* at 796 n.14, 819 n.57. (Appendix A, *infra* pp. A-15, A-67 to A-68).

Instead of engaging in any analysis of purpose or effect of the alleged discrimination, the court of appeals assumed that allopaths and osteopaths were like "retailers" and hospitals were like "manufacturers" and that, because a group boycott of one retailer by competing retailers and a manufacturer is "plainly anticompetitive," the same rule must apply in the hospital staff privileges context. *See Weiss*, 745 F.2d at 819-20. (Appendix A, *infra* pp. A-67 to A-70). The court made no attempt to determine whether the same pernicious, anticompetitive effects that led to a per se rule in retailer/manufacturer cases were present in the hospital staff privileges context.

This Court in *Broadcast Music, Inc.*, condemned a virtually identical analytic error by the Second Circuit, which had mechanistically extended the per se rule against price fixing to cover blanket licenses for copyrighted music:

> As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad.

Broadcast Music, Inc., 441 U.S. at 9. *See also National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 104 S. Ct. 2948, 2959-62 (1984).

Had the court of appeals engaged in the economic analysis required by this Court, it would have found that there are substantial competitive differences between the health care industry (particularly a nonprofit hospital) and a retail business and that those differences compel rejection of the per se rule in the staff privileges context. For example, the significant economic distortions (which inherently reduce the level of "competition" in the health care industry) -- created, *inter alia*, by the prevalence of third-party reimbursement, by extensive government regulation, and by the control over consumer demand exercised by patients' physicians — distinguish the health care industry from

retail businesses. *See* Drake & Kozak, *A Primer on Antitrust and Hospital Regulation*, 3 J. of Health Pol., Pol'y & L. 328, 332-36 (1978); 3846a-3850a. This Court has already acknowledged the view that "the health care industry does not respond to classic marketplace forces" and that "[p]erhaps it makes little sense in such a context to entertain antitrust suits intended to promote or protect free competition." *National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 392 (1981) (citing S. Rep. No. 93-1285, p. 39 (1974)).

Because of the competitive distinctiveness of the health care industry, a "literal" application of the "group boycott" label, without any economic analysis of the anticompetitive effects of adverse staff privileges decisions, is a fundamental error. As in *Broadcast Music, Inc.*, a reasoned analysis of the purpose and structure of the hospital credentialing process compels the conclusion that the pernicious, anticompetitive effects of group boycotts in the classic retailer/manufacturer cases are not present in the staff privileges context.

3. The existence of procompetitive justifications compels rejection of the per se standard.

The record demonstrates that the allegedly different standards applied to initial staff applications by osteopaths resulted from York Hospital's (and the York Medical Staff's) relative unfamiliarity with osteopathic training and references and the need to verify the credentials of all applicants to assure the highest quality of patient care at York Hospital. *See supra* pp. 4-5.

Moreover, York Hospital and the York Medical Staff offered additional explanations for the decision to deny Weiss's application for staff privileges — problems with Weiss's professional competence and character. Inexplicably, the court of appeals acknowledged the legitimacy of these justifications, but, after ruling that Weiss had established a per se violation of Sherman Act section 1 (thereby creating an entitlement to injunctive relief and attorneys' fees), the court went on to say that the procompetitive justifications could be raised only as defenses to Weiss's damage

claims.[29] *Weiss*, 745 F.2d at 820, 822, 831. (Appendix A, *infra* pp. A-70, A-74, A-96).

These justifications are sufficient to remove the case from the class of restraints that is per se illegal. As the Seventh Circuit held in its indistinguishable *Wilk* case, "the evidence of the 'patient care motive' required that rule of reason analysis be applied." *Wilk*, 719 F.2d at 221.

4. Credentialing activities are a form of industry self-regulation.

A medical staff's credentialing activities (including those in this case) should also be analyzed under the rule of reason because they are forms of industry self-regulation. This Court in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), established a test which, if met, compels rule of reason treatment, even of group boycotts, in an industry attempting to regulate itself.

The *Silver* test has three components: (i) There must be a mandate (legislative or otherwise) for self-regulation. (ii) The collective action must be consistent with the policy justifying self-regulation and no more extensive than necessary. (iii) The association making the decision must provide procedural safeguards. *See Northwest Wholesale Stationers, Inc.*, 715 F.2d at 1397; *Vuciecevic*, 572 F. Supp. at 1428.

Hospital staff privileges decisions satisfy all three of the *Silver* test's components and, therefore, must be analyzed under the rule of reason. *Vuciecevic*, 572 F. Supp. at 1428-29. *See also*

29. The court of appeals' relegation of these procompetitive justifications to the status of defenses in the damage phase of the antitrust trial is completely anomalous and unsupported by precedent. Assuming Weiss is shown to be unqualified for staff privileges, there can be no antitrust violation because the conduct is reasonable. Moreover, there can be no antitrust liability because there will be no causation between any alleged antitrust violation and any injury to Weiss. *See Out Front Productions, Inc. v. Magid*, 748 F.2d 166, 169 (3d Cir. 1984). Accordingly, the court of appeals' decision to defer consideration of Weiss's qualifications to the damage phase creates antitrust liability (along with injunctive relief and concomitant contempt threats and attorneys' fees) in the absence of an unreasonable restraint of trade or any antitrust causation.

Drexel, *The Antitrust Implications of the Denial of Hospital Staff Privileges*, 36 U. Miami L. Rev. 207, 222-27 (1982).[30]

C. The decision of the court of appeals that there was a substantial and adverse effect on interstate commerce is in direct conflict with decisions of other courts of appeals and is unjustifiable on the record.

Section 1 of the Sherman Act proscribes only contracts, combinations, and conspiracies "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. In this case, the court of appeals concluded that "York's [York Hospital's] business activities had a substantial effect on interstate commerce" and that the "interstate impact requirement" of Sherman Act section 1 was, accordingly, satisfied. *Weiss*, 745 F.2d at 824 n.65. (Appendix A, *infra* p. A-80).

By looking to York Hospital's general business activities (and not to the relationship between the particular activity challenged by Weiss and interstate commerce) to find the requisite inter-

30. Use of the rule of reason instead of the court of appeals' per se rule compels reversal of the court's finding of a violation of Sherman Act section 1. With respect to Weiss, the jury found that any conspiracy to deny Weiss staff privileges was not an unreasonable restraint of trade. Jury's Response to Special Verdict Question No. 8. (6244a).

With respect to the class, in footnote 61 of its opinion, the court of appeals stated that the conduct of the York Medical Staff violated section 1 of the Sherman Act, even under a rule of reason analysis, because it foreclosed from competitors an unreasonable amount of the market, citing footnote 51 of this Court's opinion in *Hyde*. *Weiss*, 745 F.2d at 821-22 n.61. (Appendix A, *supra* pp. A-74 to A-75). This gratuitous statement, which is another example of the unwillingness of the court of appeals to conduct any meaningful examination of the marketplace, is flatly contradicted by the jury's finding that the York Medical Staff had "no power" to exclude competitors. *Weiss*, 548 F. Supp. at 1052 (Finding of Fact No. 14). (Appendix B, *infra* p. A-100). Further, in *Hyde*, which involved an exclusive contract for staff privileges, this Court said quite clearly that a restraint is illegal only if it has a demonstrated effect on consumers. *Hyde*, 104 S. Ct. at 1568. *Accord National Collegiate Athletic Ass'n*, 104 S. Ct. at 2963-64; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343-44 (1979); *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Cos.*, 682 F.2d 660, 663-65 (7th Cir. 1982). In this case, there is no evidence that the practices or policies of the York Medical Staff had any effect on consumers (whether on the prices charged to patients or otherwise).

state impact, the court of appeals' decision is in direct conflict with the decisions of five other circuits. Moreover, on this record, there is no evidence of *any* interstate impact caused by the York Medical Staff's allegedly illegal activities.

1. The circuit conflict.

After this Court's decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), the circuits have split as to the application of the "affecting interstate commerce" test. The minority view, held by the Third and Ninth Circuits, is that the interstate commerce element is satisfied when *any* business activity of the defendant affects interstate commerce (the "general business activities test"). *See Weiss*, 745 F.2d at 824 n.65 (Appendix A, *infra* p. A-80);[31] *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980).

In direct conflict with this position is the analysis employed by the First, Second, Sixth, Eighth, and Tenth Circuits. Those courts have held that satisfaction of the interstate commerce element requires proof that the *particular* business activity challenged by plaintiff affects interstate commerce (the "infected activities test"). *See Hayden v. Bracy*, 744 F.2d 1338, 1343 (8th Cir. 1984); *McElhinney*, 1984-1 Trade Cas. (CCH) at 68,673-74; *Furlong v. Long Island College Hospital*, 710 F.2d 922, 925-26 (2d Cir. 1983); *Cordova & Simonpietri Insurance Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 44-45 (1st Cir. 1981); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 720-22 (10th Cir. 1981) (*en banc*).

The logic of the infected activities test, and the fact that it is the rule mandated by this Court's *McLain* decision, was explained by the Second Circuit as follows:

> We agree with the First and Tenth Circuits that it would not be prudent to extract from *McLain* a generalized rule that antitrust jurisdiction can be established simply by show-

31. Although there is language in the court of appeals' opinion that suggests ambivalence as to whether the Third Circuit is adopting the general business activities test, the court's application of the test leaves no doubt that it has embraced the Ninth Circuit's view. *See infra* note 32.

> ing that some aspects of a defendant's business have a relationship to interstate commerce. Rather the inquiry must be whether the defendant's activity that has allegedly been "infected" by unlawful conduct can be shown " 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *McLain*, *supra*, 444 U.S. at 246, 100 S. Ct. at 511, quoting *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, 745, 96 S. Ct. 1848, 1852, 48 L. Ed. 2d 338 (1976).

Furlong, 710 F.2d at 926.

2. Absence of effect on interstate commerce.

There is a total absence of evidence on this record to establish the jurisdictional and substantive requirement of a "nexus" between any alleged antitrust violation and interstate commerce. Significantly, the interstate commerce issue is presented to this Court on the basis of a full factual record developed at trial; this Court, therefore, need not speculate as to what Weiss "may be able to show" at trial. *See McLain*, 444 U.S. at 246.

Weiss's evidence was that York Hospital made purchases in interstate commerce and received funds from third-party payors located outside Pennsylvania. *See Weiss*, 745 F.2d at 824 n.65. (Appendix A, *infra* pp. A-80 to A-81). There was never any evidence, however, to show, or from which a jury could infer, that the *Medical Staff's* "discrimination" against osteopaths (the only antitrust violation or "infection" found in this case) had any effect whatsoever on *Hospital* purchases in or receipts from interstate commerce.[32]

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32. Even if the general business activities test could be invoked here, the interstate commerce jurisdictional requirement still would not be satisfied as against the only defendant found liable. As the court of appeals observed, the only evidence of interstate impact involved *York Hospital's* general business activities — there was no evidence of any *Medical Staff* involvement in or relationship to interstate commerce. *Weiss*, 745 F.2d at 824 n.65. (Appendix A, *infra* pp. A-80 to A-81).

The court of appeals attempted to sidestep this fatal defect by stating conclusorily and without authority that the absence of proof of York Medical Staff "activities in interstate commerce . . . is irrelevant because the medical staff does not exist independent of the hospital, and therefore the hospital's

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Dated: January 22, 1985

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NOTES *(Continued)*

activities in interstate commerce are attributable to the medical staff also." *Weiss*, 745 F.2d at 825 n.66. (Appendix A, *infra* p. A-82). This conclusion is flawed in at least two respects.

First, it is incorrect that federal jurisdiction over a principal can be imputed to give a federal court jurisdiction over agents of that principal. *Cf. Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 906 (1st Cir. 1980). Second, insofar as Weiss and the court of appeals take the position that York Hospital and the York Medical Staff are a "single entity" for purposes of the interstate commerce requirement, but not for purposes of the concerted action requirement, they seek to have their cake and eat it too. Either York Hospital and its Medical Staff are a single entity (in which event there can be no concerted action) or they are not a single entity (in which event there is no jurisdiction).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 82-3507, 82-3580 & 82-3581

MALCOLM WEISS,

Appellee in Nos. 82-3507 & 82-3580
Cross-Appellant in No. 82-3581

v.

YORK HOSPITAL and THE MEDICAL AND DENTAL STAFF OF YORK HOSPITAL, S. PHILIP LAUCKS, M.D.; HAROLD H. MacDOUGALL, M.D., IAN L. MacKENZIE, M.D., JOHN P. WHITELY, M.D., S.W. DEISHER, M.D., (Executive Committee - JACK A. KLINE, M.D., LOIS M. KUSHNER, IVAN L. BUTLER, M.D., GARY ARDISON, M.D., and THOMAS L. BAUER, M.D.,

Appellants in Nos. 82-3507 & 82-3580
Cross-Appellees in No. 82-3581

On Appeal from the United States
District Court for the
Middle District of Pennsylvania
(D.C. Civ. No. 80-134)

Argued November 15, 1983

Before: ADAMS* and BECKER, *Circuit Judges*,
and VAN DUSEN, *Senior Circuit Judge*

(Filed September 27, 1984)

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* After the oral argument Judge Adams recused and did not participate in the resolution of this appeal.

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Appendix A

OPINION OF THE COURT

BECKER, *Circuit Judge.*

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I. *INTRODUCTION AND GENERAL BACKGROUND*

This antitrust case arises from the refusal to grant hospital staff privileges to a physician. The plaintiff, Malcom Weiss, is an osteopath[1] who was denied staff

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1. Dorland's Illustrated Medical Dictionary defines Osteopathy as:

> a system of therapy founded by Andrew Taylor Still (1828-1917) and based on the theory that the body is capable of making its own remedies against disease and other toxic conditions when it is in normal structural relationship and has favorable environmental conditions and adequate nutrition. It utilizes generally accepted physical, medicinal, and surgical methods of diagnosis and therapy, while placing chief emphasis on the importance of normal body mechanics and manipulative

privileges at York (Pennsylvania) Hospital. Dr. Weiss brought this suit, both individually and as representative of the class of all osteopathic physicians in the York Medical Service Area (York MSA),[2] against York Hospital ("York"), the York Medical and Dental Staff, and ten individual physicians who served on the York Medical Staff Executive Committee and the York Judicial Review Committee. York is controlled by, and, at the time Dr. Weiss applied for staff privileges, was exclusively staffed by doctors who graduated from allopathic medical schools.[3]

The gravamen of Weiss' lawsuit is that, although allopaths (hereinafter referred to as medical doctors or M.D.s) and osteopaths (D.O.s) are equally trained and qualified to practice medicine,[4] his application for staff privileges at York hospital was turned down solely because of his status as an osteopath. Generally, a

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methods of detecting and correcting faulty structure.

Osteopathic physicians signify their degree as D.O.

2. The York MSA is the area surrounding York Hospital and includes most of York County, Pennsylvania. The area was designated by the Pennsylvania Health Systems Agency as part of that state agency's system of regulation of the provision of health care in Pennsylvania. For purposes of this case the York MSA was found by the jury to be the relevant geographic area within which to measure York Hospital's economic power.

3. Allopathy is defined as a system of remedial treatment in which it is sought to cure a disease by producing, through medicines, a condition incompatible with the disease. *See* Funk & Wagnalls New Standard Dictionary of the English Language (1942). Allopathy constitutes the common or "regular" system of medical practice. Allopathic doctors, signify their degree as M.D.

4. At trial Dr. Merle S. Bacastow, an M.D. and the Vice-President of Medical Affairs at York, testified that at least since the mid-1960's there has been no difference in terms of medical training and ability to provide medical care between graduates of osteopathic medical schools and

physician can admit and treat patients only at hospitals where he has staff privileges. If a patient desires to receive medical treatment at a hospital for which that patient's doctor does not have staff privileges (either because the patient prefers the reputation of that hospital or because that hospital is the only available hospital with equipment that is necessary for the patient's treatment) then the patient's doctor will have to refer the patient to another physician who has staff privileges at the hospital in question. *See Weiss v. York Hospital*, 548 F. Supp. 1048, 1053 (M.D. Pa. 1982) (finding of fact, No. 32-34).

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graduates of allopathic medical schools. App. at 3806a-3809a & 4014a-4015a. This observation is born out by the fact that osteopaths and allopaths are equally qualified for state licensure to practice medicine and surgery within the Commonwealth of Pennsylvania. *Compare* Pa. Stat. Ann. tit. 63, § 271.1 *et. seq.* (Purdon 1984) ("Osteopathic Medical Practice Act") *with* Pa. Stat. Ann. tit. 63, § 421.1 *et. seq.* (Purdon 1984) ("Medical Practice Act of 1974"). *See also* Blackstone, *The A.M.A. and The Osteopaths: A Study of the Power of Organized Medicine*, 22 Antitrust Bulletin 405, 408-14 (1977). Professor Blackstone concludes that in general D.O.s receive somewhat shorter, less expensive, and less specialized training than today's highly specialized M.D.s. *Id.* at 408-10. He states that this difference may justify limitations on the privileges of osteopaths that are similar to limitations imposed upon general practice M.D.s and family practitioners, but that it would not seem to justify the total exclusion of osteopaths. *See id.* at 411; Kissam, Webber, Bigers, and Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Calif. L. Rev. 595, 641 n.218 (1982) [hereinafter cited as *Antitrust and Hospital Privileges*]; Dolan & Ralston, *Hospital Admitting Privileges and the Sherman Act*, 18 Houston L. Rev. 707, 728 (1981)("Osteopaths undergo training regimens quite similar to that of M.D. practitioners, except that greater emphasis is placed on family practice and on some manipulative practices. Regardless of the situation thirty years ago, it is highly unlikely that any significant qualitative difference between the two groups exists today.").

As the result of such a referral the first doctor loses the opportunity to treat (and therefore to charge) the patient.

In addition, Weiss alleged that the treatment that he received at the hands of the M.D.s who control York sent a message to other D.O.s in the York MSA not to apply for staff privileges at York. In Weiss' submission, this scheme to exclude D.O.s from York Hospital was motivated by a desire to restrict the ability of D.O.s to compete with M.D.s, thereby increasing the profits of the M.D.s. Weiss contends that this conduct violates sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, and state law (tortious interference with contractual relations).

The district court bifurcated the trial. The liability phase commenced on August 11, 1982, and on September 1, 1982, the jury returned unanimous answers to 42 special verdict questions. The district court molded the jury's responses into findings of liability in favor of the class (but not Weiss) and against the medical staff on the section 1 claim; in favor of Weiss and the class and against the hospital on the section 2 claim; and in favor of Weiss and against the hospital and four of the individually named defendants on the state law claims. All other defendants were exonerated on all other claims. Adopting the jury's findings of fact (by which it considered itself bound), the district court thereupon entered a final injunction against the hospital and the medical staff pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26, essentially prohibiting them from future discrimination against osteopaths. In addition, the district court scheduled a second trial to determine damages based on plaintiffs' claim for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, ordered that all class members be notified of their right to apply for damages. Prior to commencement of that trial, defendants and plaintiffs brought these appeals.

The case raises a number of complicated legal questions. Our opinion is divided into five parts. Part I is this introduction and general background. In part II we detail the facts. Part III discusses a number of preliminary issues, including the extent of our appellate jurisdiction over the questions presented by the appeals, the propriety of the class certification, and the proper vicinage for the jury trial in this case. We hold that we have no appellate jurisdiction to review the defendants' challenges to the district court's findings of liability under section 1 and 2 of the Sherman Act to the extent that those findings relate solely to plaintiffs' claims for treble damages under section 4 because there is no final judgment as to these claims, and no exception to the final judgment rule applies. We reach the same conclusion with respect to the state law claims. We thus limit this opinion to a review of questions raised by the district court's issuance of an injunction under section 16 and its exoneration of some of the defendants on some of plaintiff's claims. We also hold that the class certification was proper and that the trial was held in an appropriate location.

In part IV we turn to the heart of this appeal: a review of the findings of liability under sections one and two of the Sherman Act against the hospital and the medical staff, and the consequent issuance of an injunction under section 16 of the Clayton Act. We affirm the court's issuance of an injunction against the medical staff for violating section 1, an injunction that also benefits Weiss. However, we reverse the district court's grant of an injunction against the hospital for violating section 2 because we believe that that plaintiff has failed to adduce sufficient evidence to enable him to carry his burden of demonstrating that the hospital engaged in any willful behavior designed to acquire or maintain its monopoly power. Because of a problem with the jury charge we grant a partial new trial on the question of Weiss' professional competence and

character, a factor relevant to the defendants' defenses to Weiss' section 1 damage claims. In addition, we affirm, as supported by the evidence, the district court's exoneration of various defendants on various claims. We then review the scope of the injunction issued by the district court and conclude that, given our substantive decisions on the questions of liability under sections 1 and 2, the district court should be given the opportunity to re-consider the appropriate scope of injunctive relief in the first instance. Part V contains a summary of our conclusions.

II. *THE FACTS*[5]

A. *Hospital Services in the York MSA*

There are two providers of in-patient hospital services in the York MSA: York, which is run by M.D.s, and Memorial Hospital ("Memorial"), which is run by D.O.s. York is by far the larger of the two, with approximately 450 beds and 2,500 employees. Memorial has 160 beds.[6] The testimony at trial established that York had a market share of 80% of the patient-days of hospitalization in the York MSA.

In addition to York's overall market dominance, testimony at trial established that certain complex, highly technical "tertiary care"[7] services and facilities

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5. The facts set forth below were culled from the evidence presented to the jury.

6. The record does not reveal how many employees Memorial has.

7. "Tertiary care" is a term used by the parties in this litigation to signify highly specialized "third level" hospital care. Testimony at trial indicated that there are three "levels" of hospital care. The first or primary level involves "the relationship between patient and physician usually in an outpatient setting." The second level usually involves "the application of a specialist, an internist in a hospital setting." The third or tertiary level is the "most sophisticated type of care involving intensive care and the use of subspecialists." App. at 5133a-38a.

are, for a number of reasons, only available at York.[8] Included among the services offered only at York are therapeutic radiology, open heart surgery, cardiac catheterization, renal dialysis, neo-natal intensive care, short-term acute psychiatric care, monitored stroke treatment, audiology, burn care, cardiopulmonary laboratory, cardiopulmonary rehabilitation, electroencephalography, genetic counseling, prosthetic service, speech therapy, computerized axial tomography (CAT scan),[9] and infusion aspirator.

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8. There appear to be two major reasons why Memorial does not offer tertiary care services and facilities. The first reason relates to the availability of the necessary equipment. State and federal regulations require a hospital to first obtain a "certificate of need" before purchasing expensive equipment. These certificates will not be issued when another hospital in the same service area already has the equipment and that other hospital can handle the total patient demand for that service in that area. Note, *Health Professionals' Access to Hospitals: A Retrospective and Prospective Analysis*, 34 Vanderbilt L. Rev. 1161, 1183-84 (1981); Blumstein & Sloan, *Redefining Government's Role in Health Care: Is a Dose of Competition What the Doctor Should Order?*, 34 Vanderbilt L. Rev. 849, 920-924 (1981); Blumstein & Calvani, *State Action As A Shield and a Sword in a Medical Services Antitrust Context: Parker v. Brown in Constitutional Perspective*, 1978 Duke L.J. 389, 435-437 (1978). Since most tertiary care equipment is highly sophisticated and thus very expensive and since York already possesses the equipment and can handle the total patient demand for the York MSA, Memorial cannot obtain the required "certificates of need" to purchase tertiary care equipment for itself. The second reason is medical training. Tertiary care is only provided by highly specialized physicians. Because most D.O.s do not highly specialize, *see* Blackstone, *supra* note 4, at 407 & 427, there are few who are qualified to provide tertiary care services. By contrast, M.D.s tend to highly specialize, even outside large metropolitan areas, *id.*, hence an M.D. hospital like York is a natural place for providing tertiary care services.

9. Apparently Memorial acquired a CAT scan during the course of this litigation.

B. *Discrimination Against D.O.s at York*

Prior to 1974, both York hospital's corporate charter and the bylaws of the York medical staff barred D.O.s from obtaining staff privileges at York. "Without staff privileges, a physician cannot admit, effectively follow, or treat patients at York Hospital." *Weiss*, 548 F. Supp. at 1053 (finding of fact No. 32). Consequently, whenever a patient of a D.O. wanted to go to York for treatment, either because the patient preferred the reputation and size of York over Memorial, or because the patient required tertiary care services that were available only at York, the treating D.O. had no choice but to refer the patient to an M.D. with staff privileges at York. *Weiss*, 548 F. Supp. at 1053 (finding of fact No. 33).

The evidence adduced at trial indicated several ways in which D.O.s were economically disadvantaged as a result of this discrimination. First, D.O.s lost fees directly when one of their patients was admitted for treatment at York. Obviously, if the patient required treatment that the D.O. was qualified to provide but could perform only at York, the D.O. lost the fees that would ordinarily be charged for those services. Moreover, even if the patient required services that the D.O. was not qualified to provide, the D.O. lost the fees for those non-specialized services provided to patients both before and after the specialized care that he was qualified to perform but which had to be performed in York Hospital by an M.D. It is primarily the loss of these latter fees, derived from monitoring a patient who is receiving tertiary care from a specialist, that economically disadvantaged general practice D.O.s, who were forced to refer patients needing tertiary care to a general practice M.D. with staff privileges at York.

D.O.s were also indirectly disadvantaged as the result of York's discriminatory policy. When patients of D.O.s were referred to M.D.s in order that they could be treated at York, they sometimes did not return to the referring D.O. after the treatment at York was

completed, but instead remained in the care of the referred M.D. *See Weiss*, 548 F. Supp. at 1053 (finding of fact No. 35). Thus the referring D.O. lost the patient not just for purposes of the immediate treatment at York, but for purposes of subsequent medical care which the D.O. was qualified to provide.[10] Additionally, the evidence established that the absence of staff privileges is a competitive disadvantage, in that it indicates to patients that the doctor is a second-class practioner. *See Weiss*, 548 F. Supp. at 1052-53 (findings of fact Nos. 29 & 35).[11] Both of these factors placed D.O.'s at a competitive disadvantage vis-a-vis M.D.s in obtaining and retaining patients.

In 1974 York amended its corporate charter to allow osteopathic physicians to practice at York. Osteopaths were still barred from admission to York, however, because of the prohibition in the medical staff bylaws. Nevertheless, in early 1976, Weiss and another osteopath named Dr. Michael Zittle, both of whom were engaged in family practice in the York MSA, applied for staff privileges at York. Dr. Weiss informed representatives of the York medical staff that if York excluded him because of his osteopathic training he would institute legal action.

The York medical staff considered the applications and Weiss' threat of legal action, and in November of 1976 amended its bylaws to permit admission of osteopaths at York. Dr. Weiss' contends that the amendment of the bylaws was purely cosmetic, and that since 1976 the York medical staff has engaged in a deliberate covert policy of discrimination against osteopaths. In support of this contention Weiss offered evidence that York had a historical presumption in favor of admitting any M.D. who applied for staff

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10. *See generally* Dolan & Ralston, *supra* note 4, at 713-714.

11. *See also* Dolan & Ralston, *supra* note 4, at 714.

privileges, regardless of the applicant's medical ability or social graces,[12] but that in the case of D.O. applicants York engaged in "strict scrutiny" of the applicant's medical qualifications, and, in addition, considered the applicant's social acceptability. If the D.O. was found lacking, even minimally, in either area, his application was denied. Finally, Weiss adduced evidence that in the evaluation process for D.O.'s (but not M.D.'s), York relied on hearsay as grounds for rejecting an application for staff privileges. Because "[t]he denial of hospital staff privileges to a physician or the revocation of such privileges is a serious adverse professional event which is likely to besmirch the professional reputation of such a physician," *Weiss*,

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12. In the ten years proceding the date of the trial, York and its staff received approximately 200 applications by M.D.s. During this period the only M.D. to ever be denied privileges was suffering from psychiatric problems. The presumption enjoyed by M.D.s was even strong enough to permit the admission to staff privileges at York of a certain Dr. "A" [actual name held confidential by the district court] even after the following report was made to the medical staff by one of its senior members based on extensive personal evaluation:

> [Dr. A] has demonstrated poor judgment in decisions about therapy without obtaining all the facts at hand or necessary to make these judgments or decisions. Moreover he has proceeded in an over-confident manner such as administration of hydrochloric acid . . . to correct metabolic alkalosis where other modes of therapy were indicated. I have discussed these actions with him but they tend to recur. He answers questions about events and dates on patients without knowing the facts. He is not able to provide total patient care. He has serious deficiencies in medical knowledge. And moreover compounds these deficiencies by neglecting to obtain the facts before treatment of patients.

548 F. Supp. at 1052 (finding of fact No. 29), the district court found that application of the strict scrutiny standard to Weiss' application for staff privileges, and the consequent denial of Weiss' application, "could reasonably be anticipated to cause [other] osteopathic physicians to refrain from applying for staff privileges at York Hospital." *Weiss*, 548 F. Supp. at 1053 (finding of fact No. 31).[13]

In addition to discriminating against D.O.s in the admissions process, Weiss also offered evidence that York automatically gave any D.O. who survived the strict scrutiny of that process the lowest category of staff privileges offered by York, that of "Assistant Staff," regardless of the D.O.'s actual skill level. Under the Assistant Staff category of privileges the physician is required to consult with other members of the department in the care and treatment of his patients. By contrast, M.D.s who applied for and received staff privileges at York were given different levels of staff

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13. Since the time of Weiss' application for staff privileges, six other D.O.s have applied to York. Of those six, five were accepted and one application is dormant awaiting supplementation by the applicant. Thus eight D.O.s have applied to York since the medical staff bylaws were changed, and only one applicant -- Dr. Weiss -- has been rejected. *Weiss*, 548 F. Supp. at 1053 (findings of fact Nos. 36-40). The defendants assert that these facts can only be interpreted to mean that the defendants did not discriminate against D.O.s and that D.O.s are not dissuaded by fear of rejection from applying to York hospital for staff privileges. The plaintiffs counter that the jury reasonably concluded that during the pendency of this litigation the defendants had decided not overtly to discriminate against D.O.s, and that the six D.O.s who applied since Weiss' rejection anticipated this decision. The district court apparently agreed and in addition concluded that many more than six D.O.s would have applied for staff privileges at York but for York's discriminatory treatment of D.O.s and the adverse professional consequences of rejection. *Weiss*, 548 F. Supp. at 1058.

privileges depending on their level of skill as certified by the various M.D. specialty Boards. *See Weiss* 548 F. Supp at 1051, 1060, & 1061 (finding of fact No. 8, conclusion of law No. 1, & order Nos. 1.1 & 1.3). The alleged effect of this discrimination was to brand D.O.s as second class doctors.

C. *Staff Privileges Application Procedure*

When a physician applies for staff privileges at York, the following procedure is customarily followed. After the applicant's background and reference information has been gathered, the chairman of the hospital department in which the applicant seeks privileges evaluates the application. In the Family Practice Department, to which Weiss applied, the department chairman selects a department credentials committee to assist the chairman in formulating the evaluation. Once the department makes a recommendation, the Medical Staff's Credentials Committee reviews the application and related file, including the (Family Practice) department's recommendation, and formulates its own recommendation to the Medical Staff Executive Committee. The Medical Staff Executive Committee independentiy reviews the application and related file and formulates a recommendation on the application to the hospital's Board of Directors.[14]

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14. For a discussion of the relationship between the Medical Staff Executive Committee and the Board of Directors, *see generally Antitrust and Hospital Privileges*, *supra* note 4, at 641. ("[B]ecause the medical staff, like an agency, has 'the authority' to evaluate applicants for privileges, the hospital board functions as a reviewing court that recognizes substantial discretion in the staff and upholds the staff's decision if it is supported by any 'rational basis' or 'substantial evidence.'"); *See also* Dolan and Ralston, *supra* note 4, at 711-712 ("[F]ormalities are misleading . . . . [T]he significant entity in the application process is the medical staff.")

The hospital Board of Directors then refers the application to its standing Medical Affairs Committee, which recommends a disposition of the application. Finally, based on the applicant's file and the various recommendations of the committees, the Board of Directors decides whether to accept or reject the application. If either the Medical Staff Executive Committee or the hospital's Board of Directors makes an adverse decision, the applicant is informed in writing. The applicant may, at that point, request and obtain (1) a written statement of the reasons for the recommendation or decision, and (2) the impanelling of a "judicial review" committee composed of physicians who have had no part in the consideration of the application to that point. The judicial review committee is authorized to hear testimony and receive other evidence to determine whether the adverse recommendation on the application was "in error, unreasonable, arbitrary, or capricious." The applicant is entitled to attend the hearing, to call witnesses and introduce evidence, to cross-examine and impeach witnesses, and otherwise to rebut adverse evidence.[15]

D. *Doctor Weiss' Application for Staff Privileges*

In 1976 Doctors Weiss and Zittle applied for staff privileges in York's Family Practice Department. In accordance with the procedures outlined above, the Family Practice Department Credentials Committee and the chairman of the Family Practice Department considered the applications. On January 17, 1977, the department recommended that they be accepted. The Medical Staff Credentials Committee then reviewed the

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15. The hearing proceedings are stenographically transcribed, but the committee is not bound by the strict rules of evidence.

applications and also recommended acceptance. The Medical Staff Executive Committee, however, did not approve either application. Instead, it took the unusual step of deciding to conduct a further investigation.[16] The Committee made extensive oral and written inquiries concerning the professional competence and moral character of both Weiss and Zittle. No such survey had ever before been conducted by the hospital before. Ultimately the investigation turned up some questions about Dr. Weiss' personality.[17] The investigation also raised some glimmer of a question about Dr. Weiss' medical competence, but the sole "evidence" that was adduced was hearsay, often second

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16. The ordinary procedure is described in Dolan & Ralston, *supra* note 4, at 712 ("When an application is received, it is referred to the specialty service or services for which privileges have been requested . . . . After the application is approved or disapproved, it percolates back up through the system where deference to the decision increases as the application reaches higher levels of review. Absent extraordinary circumstances, the decision to grant a physician privileges approved by the relevant entity is rarely overturned by the entire medical staff committee, which makes the ultimate recommendation to the governing board.").

17. For example, one M.D., Dr. Bauer, who was contacted by the Committee responded with the following comment:

> [C]oncerning Dr. Weiss, my only contacts with him have been at the York Squash Club social gatherings several years ago. I must confess that at the time I found Dr. Weiss rather outspoken, [and] extremely aggressive, but you must understand that these are only my personal observations at some social functions and do not relate directly to Dr. Weiss' medical training and/or skills.

or third level hearsay.[18] Nevertheless, the Medical Staff Executive Committee, apparently based on this "new evidence," decided not to recommend Weiss for staff privileges.

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18. For example, one M.D., Dr. Woerthwein, wrote that although he did not know Dr. Weiss personally, "some" of Dr. Weiss' patients had complained that Dr. Weiss' examinations were "superficial" and his diagnoses were "unfounded." Another M.D., Dr. Myers, wrote that an unnamed D.O. on the staff of Memorial had called Dr. Weiss a "rebel" and said that 90% of Dr. Weiss' patients were medical assistance patients whom he sees "at a very fast rate." A third doctor, an D.O. named Dr. Kammer, reported that Dr. Weiss' contract with Memorial to work in that hospital's emergency room was terminated because Dr. Weiss "related so badly to people of the lower socio-economic class." However, this contention was directly contradicted by other evidence that Dr. Weiss (and Dr. Zittle) had resigned from service in the emergency room because of a dispute over their salary. Finally, the Committee received a letter from Dr. Herman, an M.D., stating that he had been told by someone working in the York office of the Pennsylvania Department of Public Assistance that the office had received "many complaints from patients about incomplete exams by Dr. Weiss and about his lack of rapport with them."

    Although it was not known to the committees at York considering Weiss' application for staff privileges, and only revealed in discovery proceedings in this case, the defendants adduced certain evidence tending to show that Dr. Weiss was discourteous to nurses in areas of the hospital where patients might have overheard and been distracted. This evidence was contained in hospital files that the defendants characterized as business records, but the evidence was never admitted, apparently either because the defendants did not authenticate the records or because the district court exercised its discretion to exclude them under Fed. R. Evid. 403 (they were offered solely for impeachment purposes). App. at 5160a-5171a. It is possible that this evidence may be offered again, and we express no view concerning its admissibility at that time since no objection was taken by the defendants to its exclusion at the first phase of this trial.

On June 30, 1977, the hospital Board of Directors considered the recommendations of the various committees which had considered Weiss' and Zittle's applications. The Board voted to approve Zittle's application and deny Weiss' application. Notice of the Board's action was sent to Weiss the same day.

On August 19, 1977, following meetings with York officials, Weiss requested that his application be reactivated and hence reconsidered. This request was granted, and Weiss again received the favorable recommendation of the Family Practice Department's Credentials Committee, and the Family Practice Department chairman. The Credentials Committee's written report is revealing in both its assessment of the "evidence" against Weiss, and in its frank recognition of the "controversy" at York over the admission of D.O.s to staff privileges:

> The Committee invited Dr. Weiss to discuss the reactivation of his application and to direct certain questions to him. He was told of the developments in the past and precisely how his application has been handled and of the problems that had arisen. He was specifically told that almost everybody with whom we spoke acknowledged him to be an intelligent, competent, conscientious physician whose care of his patients in the Hospital was quite competent. He was told that the Chairman of his Department suggested that he probably was the best general practitioner. However, almost everyone to whom we spoke acknowledged that he has had personality problems in the past which have caused him to have difficult interpersonal relations with other members of the staff. He was told that because of this personality problem, his application was rejected. It was further explained to him that because of the controversy that accompanied the

application of osteopaths to the York Hospital, it was felt that acceptance of his application would jeopardize that endeavor. We explained to Dr. Weiss that his admission to the staff would be met in some instances with outright hostility and in others with indifference and it was a matter of real concern to the Committee how he would react to this sort of reception.

Weiss replied that he felt his personal problems had been overstated . . . .

He was questioned at length by every member of the Committee concerning his background, his motivation and his reputed personality problems. Dr. Weiss conducted himself throughout the interview in a professional manner and responded to a number of very difficult questions in a positive, constructive fashion.

. . . . Although the Committee has pursued every allegation in his folder diligently with numerous conversations with numerous people it was unable to find one person who could specifically confirm any of the allegations. The Committee was left with the realization that all the allegations were hearsay, that it was left without one witness who could take the stand and make an intelligent case before a judge or jury. Futhermore, it was the opinion of the Committee after today's interview that Dr. Weiss recognizes the position in which he has placed himself and that he will probably conduct himself in a very careful, cautious, professional manner should he be accepted to the staff at York Hospital.

On February 28, 1978, the Medical Staff Credentials Committee voted to recommend again that Weiss' renewed application be accepted. However, on March 6,

1978, the Medical Staff Executive Committee again voted to recommend that the application be denied.[19]

Weiss' application was next referred to the Medical Affairs Committee of the hospital's Board of Directors. This committee directed that the members of the Family Practice Department Credentials Committee, the Medical Staff Credentials Committee, and the Medical Staff Executive Committee meet informally to attempt to reach a consensus on Weiss' application. The members of these committees then met on March 20, 1978, and voted to recommend that Weiss' application be denied.[20] The Medical Staff Executive Committee then met on April 19, 1978, to re-reconsider Weiss' application and, for the third time, voted to recommend that the hospital Board of Directors deny the application.

On April 21, 1978, York sent Weiss written notice of the April 19, 1978, unfavorable recommendation of the Medical Staff Executive Committee. Upon being advised of the decision of that Committee, Weiss requested and received a statement of reasons. Weiss' status as a D.O. rather than a M.D. was not one of the reasons cited by the Committee in its official statement of reasons. Weiss also requested an appeal to a "judicial review" committee as provided for in the hospital bylaws.

A "Judicial Review" Committee was impanelled[21] and a hearing was held. Weiss was present and represented by counsel at this proceeding. After

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19. The Executive Committee was composed of Doctors Ardison, Bauer, Butler, Kline, and Kushner. These five physicians are named defendants.

20. The vote was six for denial of the application, five for acceptance, one abstaining, and two absent.

21. The Committee consisted of Doctors Laucks, MacDougall, MacKenzie, Whiteley, and Deisher. These five doctors are named defendants.

reviewing all the evidence, the commmittee, on December 28, 1978, determined unanimously that the decision of the Medical Staff Executive Committee not to recommend Weiss for staff privileges was not unreasonable, arbitrary, or capricious. The committee also determined, with one member dissenting, that the Medical Staff Executive Committee was not in error in its recommendation.

The hospital Board of Directors then held a special meeting at which presentations were made by counsel for Weiss and special counsel for the Hospital. On March 13, 1979, the Board voted to deny Weiss staff privileges.

II. *PROCEDURAL HISTORY AND PROBLEMS*

A. *Before the District Court*

On February 6, 1980, Weiss filed this suit in the United States District Court for the Middle District of Pennsylvania. The complaint named as defendants York Hospital, the York Hospital Medical and Dental Staff, and ten individual members of the York medical staff: the five physicians who in their capacity as members of the Medical Staff's Executive Committee voted on Dr. Weiss' application for privileges, and the five physicians who constituted the Judicial Review Committee that was specially impanelled to review the Executive Committee's recommendation that Weiss not be given staff privileges at York.[22] Weiss' complaint alleged that his application for staff privileges at York was denied because of: (1) a concerted refusal to deal with him and all other osteopathic physicians located in and around York, Pennsylvania, in violation of

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22. The ten individual defendants were added in an amended complaint after the district court granted the defendants' motion to dismiss the initial complaint.

section 1 of the Sherman Act, 15 U.S.C. § 1; (2) monopolization, attempted monopolization, and conspiracy to monopolize in violation of section 2 of the Sherman Act, 15 U.S.C. § 2; and (3) violation of Pennsylvania antitrust and common law. The alleged relevant geographic market coincided with the York MSA. The district court certified the class of all osteopaths in the York MSA as the plaintiff class.[23]

The liability issues were tried to a jury for three weeks in September, 1982. At the end of the trial the court submitted 42 special verdict questions to the jury. The jury answered all the questions unanimously. The district court molded the jury's answers into

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23. On May 28, 1981, following a two-day hearing, the district court granted plaintiff's motion for class action certification, determining that the action could be maintained under Fed. R. Civ. P. 23(b)(2) on behalf of a class of all osteopathic physicians practicing medicine in the York MSA. On September 25, 1981, the district court denied the motion by all defendants for summary judgment. Weiss v. York Hospital, 524 F. Supp. 433, 442 (M.D. Pa. 1981).

Subsequently the defendants sought two writs of mandamus and prohibition from this Court. In one matter, No. 81-2191, the petition was directed to the district court's certification of the plaintiff class. This Court denied the petition holding that mandamus and prohibition were not available. In the other matter, No. 81-2171, the court denied a petition directed to the district court's order authorizing discovery of confidential income data of approximately 100 M.D.s in the York area until completion of the liability portion of the bifurcated trial, and retained -- and still retains -- jurisdiction in the matter. The opinion in both matters is reported as DeMasi v. Weiss, 669 F.2d 114 (3d Cir. 1982).

Thereafter, defendants filed a motion before the district court to decertify the class. The motion was denied on August 18, 1982.

findings of fact,[24] and, based on these findings, the court reached the following conclusions of law:

> 1. On the § 1 claim, the staff (but not the hospital) is liable to the plaintiff class but not to Weiss;
>
> 2. On the § 2 claims, the hospital (but not the staff) is liable to both Weiss and the class for monopolization, attempted monopolization, and conspiracy to monopolize;
>
> 3. On the pendent state law claims, the hospital (but not the staff) and four physicians are liable to Weiss but not the class for interference with contractual relations; and
>
> 4. The remaining six physician defendants are not liable to anyone for anything.

Weiss, 548 F. Supp. at 1060-62.[25] The court then held an additional one-day hearing to consider plaintiff's

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24. There were three sets of "findings" made during the trial of this case. First, the jury made findings when it answered the 42 special verdict questions propounded to it by the district court. *Weiss*, 548 F. Supp. at 1051. Second, the district court, in a written opinion subsequent to the jury verdict, made 40 findings of fact, the first 28 of which were explicitly based on (and in fact were merely restatements of) the jury's answers to the special verdict questions. *Id.* at 1051-53. Third, the remaining 12 findings of fact were apparently made by the district court in its role as a court of equity deciding whether or not to issue an injunction against the defendants. In addition, of course, the district court made conclusions of law which were essentially molding the jury's answers into verdict form. *Id.* at 1060-61.

25. The defendants have provided the following chart, which is helpful in visualizing the district court's conclusions of law:

request for equitable relief. Based on the jury's answers to the special verdict questions, the court's findings of fact and conclusions of law, and the additional hearing on equitable relief, the district court entered a final order pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26, enjoining the hospital and the medical staff from:

> 1. undertaking any act against Weiss or the class "which would in any way impede or deny the Plaintiffs full, reasonable, fair, or equal access to the facilities of York Hospital and full, reasonable, fair or equal access to staff privileges at the York Hospital;"

Defendants	§ 1 Sherman Act (Weiss & Class)	§ 2 Sherman Act (Weiss & Class) Monop./Attempt/Consp.			State Law (Weiss Only)
York Hospital	--	W&C	W&C	W&C	W
York Hospital Medical Staff	C	--	--	--	--
Ardison	--	--	--	--	--
Bauer	--	--	--	--	W
Butler	--	--	--	--	W
Deisher	--	--	--	--	W
Kline	--	--	--	--	--
Kushner	--	--	--	--	W
Laucks	--	--	--	--	--
MacDougall	--	--	--	--	--
MacKenzie	--	--	--	--	--
Whiteley	--	--	--	--	--

W = Liable to named plaintiff
C = Liable to class
-- = Exonerated

> 2. "applying standards of review to applications by osteopathic physicians for staff privileges at the York Hospital different from the standards of review applicable to similar applications of allopathic physicians." and
>
> 3. "interpreting the expression 'American Board of Medical Specialty' as used in the York Hospital Medical Staff By-Laws to exclude osteopathic boards of medical specialty."

Weiss, 548 F. Supp. at 1061.

In addition to entering the injunction, the district court also entered the following "judgment on special verdict":

> JUDGMENT ON SPECIAL VERDICT -- "that the York Hospital Medical and Dental Staff is liable to the Plaintiff Class for violations of Section 1 of the Sherman Act: Further, that the York Hospital is liable to Plaintiff Malcolm Weiss and the Plaintiff Class for violations of Section 2 of the Sherman Act: Further, that the York Hospital, Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S.W. Deisher, M.D. and Lois Kushner, M.D., are liable to Plaintiff Malcolm Weiss for tortiously interfering with his contractual relations with third parties. It Is Further Adjudged that Gary Ardison, M.D., Jack A. Kline, M.D., S. Philip Laucks, M.D., Harold H. MacDougall, M.D., Iain L. MacKenzie, M.D. and John P. Whiteley, M.D., are not liable to either Plaintiff Malcolm Weiss or the Plaintiff Class: Further, that as against the Defendants named in the preceding paragraph Plaintiff Malcolm Weiss and the Plaintiff Class shall take nothing and this action shall be dismissed" as to the them.

Weiss, 548 F. Supp. at 1062. On October 12, 1982, the defendants moved the district court to certify this "judgment on special verdict" as final pursuant to Fed. R. Civ. P. 54(b). Plaintiff opposed this motion for certification by memorandum filed October 27, 1982. On November 18, the district court granted the defendants' motion and entered the following order:

> 1. The defendants' motion for certification is granted.
>
> 2. This Court hereby certifies that there is no just reason for the delay of an appeal in this case.
>
> 3. The Clerk of Court is hereby directed to amend the judgment on special verdict entered September 30, 1982, as follows:
>
> > It is ordered that the judgment on Special Verdict entered on September 30, 1982, is final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

B. *Appellate Jurisdiction*

Three appeals have been filed in this case. The first is an appeal filed on October 28, 1982, by the hospital and staff from the district court's injunction which was entered on September 30, 1982. The second appeal is by the hospital, the staff, and the four individual defendants who were found liable to the plaintiffs under the Sherman Act and state law; this appeal was filed on December 9, 1982, from the "order and final judgment entered 11/18/82 and order entered 11/22/82 denying these defendants' motion for judgment notwithstanding verdict or for a new trial and all other orders, rulings and judgments of the court." The third appeal was filed on December 13, 1982, by the plaintiff. This appeal is denominated a "cross-appeal" and is from the "orders directing judgment in favor of certain defendants which became final on November 18, 1982."

The defendants' appeal from the grant of the injunction is authorized by 28 U.S.C. § 1292(a)(1) and therefore it is clearly before us.[26] The viability of the other two appeals presents much more difficult questions. Because the two appeals raise different problems, we consider them separately.

1. *The Defendants' December 9th Appeal*

The December 9th appeal by the defendants purports to be from the "judgments" (other than the injunction) that resulted from the district court's September 30th "special verdict." However, because the trial was bifurcated and additional proceedings, including the determination of certain defenses and of damages, are yet to take place, most of these "judgments" (i.e., those not resulting in verdicts for the defendants) are not final within the meaning of 28 U.S.C. § 1291, *see Catlin v. United States*, 324 U.S. 229, 233 (1945) (a "final decision" for purposes of 28 U.S.C. § 1291 "is one which ends the litigation on the

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26. The injunction was entered on September 30, 1982, and the defendants appealed it on October 28, 1982, within the thirty days provided by Fed. R. App. P. 4(a)(1). However, on October 12, 1982, the defendants made a motion under Rule 50(b) for judgment notwithstanding the verdict or for a new trial and that motion was not denied by the district court until November 22, 1982. Under the rule announced in Griggs v. Provident Consumer Discount Co., 103 S.Ct. 400 (1983), a timely-filed Rule 50(b) motion prevents the parties from appealing the judgment until the district court decides the motion. *See* Fed. R. App. P. 4(a)(4). Therefore, if the defendants Rule 50(b) motion was timely filed, the October 28th appeal was void. Fortunately for defendants, however, their Rule 50(b) motion was not timely filed because it was brought one day late, *see* Turner v. Evers, 726 F.2d. 112, 113 n.2 (3d Cir. 1984) (explaining computation rules of Fed. R. Civ. P. 6(a)), and therefore the appeal from the injunction was valid. Fed. R. App. P. 4(a)(4).

merits and leaves nothing for the court to do but execute the judgment"): *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1321 (5th Cir. 1976) ("a finding of 'liability' in Phase I of a bifurcated trial is interlocutory"); *see also Sun Shipbuilding & Dry Dock Co. v. Benefit Review Board*, 535 F.2d 758, 760 (3d Cir. 1976). Moreover, as to those judgments in defendants' favor, having prevailed, they cannot appeal. Therefore, it would appear that we have no jurisdiction to hear this appeal.

The defendants argue, however, that we have jurisdiction because of the November 18, 1982, order of the district court certifying the September 30, 1982, "judgment on special verdict" as final pursuant to Fed. R. Civ. P. 54(b).[27] Rule 54(b), however, does not authorize the district court to certify non-final decisions as final; rather, the Rule's purpose is to permit the district court to separate out final decisions from non-final decisions in multiple party and/or multiple claim litigation in order to allow the losing party an immediate appeal. *See Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742-44 (1976) (partial summary judgment limited to the issue of liability, which reserves the issue of damages and other relief, is not "final" within the meaning of 28 U.S.C. § 1291).

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27. Rule 54(b) states:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The defendants' December 9th appeal must therefore be dismissed for two reasons. First, all of the *final* decisions that resulted from the September 30th "judgment on special verdict" were in favor of the defendants and the defendants cannot appeal decisions that they have won. Second, because additional portions of the bifurcated trial have not yet been held, all the "judgments" *against* the defendants arising out of the September 30th special verdict are non-final and therefore not appealable under 28 U.S.C. § 1291. Furthermore, these non-final "judgments" do not fall within any of the limited exceptions for interlocutory appeals.[28] Thus, this Court is without appellate jurisdiction to hear the defendants' December 9, 1982, appeal.

The defendants suggest that even if the non-final decisions that resulted from the special verdict are otherwise non-appealable, we can review those decisions under the doctrine of "pendent appellant jurisdiction," citing *Kershner v. Mazurkiewicz*, 670 F.2d 440, 448 (3d Cir. 1982) (in banc). In *Kershner*, Judge Adams, speaking for the full Court, narrowly construed the pendent appellate jurisdiction doctrine stating:

> If the . . . issue appealable under section 1292(a)(1) *cannot be resolved* without reference to the otherwise nonappealable . . . issue -- either because the latter issue directly controls disposition of the former, or because the issues are, in some other way, inextricably bound -- then both issues *must* be addressed in order to resolve properly the section 1292(a)(1) . . . issue. In such a situation, the appellate court has no choice: any more limited review would deprive

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28. The case was not certified under 28 U.S.C. § 1292(b), nor does it fall under the collateral order or other judge-made exceptions to the finality doctrine.

> the appellant of his or her congressionally mandated right to a section 1292(a)(1) interlocutory appeal. If, on the other hand, the appellate court can dispose of the section 1292(a)(1) appeal without venturing into otherwise nonreviewable matters, its jurisdiction should be limited accordingly.

Id. at 449 (emphasis in original; footnotes omitted). *See also Allegheny County Sanitary Authority v. U.S.E.P.A.*, 732 F.2d 1167, 1173 (3d Cir. 1984).

In applying the *Kershner* doctrine to this situation, we understand that, to the extent that there are factual or legal issues that must be resolved in ruling on the appealable orders, our holdings on those issues will be the law of the case and control in possible future appeals. However where, as here, there are significant issues involved in the non-appealable orders which are (or may be) different from issues involved in the appealable orders, we do not have pendent appellate jurisdiction to review those non-appealable orders. For example, while we conclude, *infra* text accompanying notes 30-32, that there is no requirement that each member of the plaintiff class must make a demand for staff privileges in order for the class to qualify for injunctive relief pursuant to section 16, we specifically reserve the question whether a demand is required in order to recover treble damages pursuant to section 4. This latter issue is not "inextricably bound" with the appeal from the injunction and therefore we may not exercise pendent appellate jurisdiction to decide it. Similarly none of the issues involved in the non-final state law claims are inextricably bound up with the appeal from the injunction or the appeal for the dismissed state law claims and therefore these issues are also not appealable. In sum, the *Kershner* doctrine does not save the defendants' December 9th appeal.

2. *The Plaintiffs' December 13th "Cross-Appeal"*

The plaintiff appealed from a number of final judgments against the plaintiff and the plaintiff class, in the December 13th cross-appeal. As to plaintiff Weiss there are final judgments:

(1) in favor of defendant York on his section 1 claim;

(2) in favor of the defendant medical staff on all claims (sections 1 and 2 and state law); and

(3) in favor of defendants Ardison, Kline, Laucks, MacDougall, MacKenzie, and Whiteley on all claims, and in favor of defendants Bauer, Butler, Deisher, and Kushner, on the sections 1 and 2 claims.

As to the plaintiff class there are final judgments:

(1) in favor of defendant York on the section 1 claim;

(2) in favor of the defendant medical staff on the section 2 claim; and

(3) in favor of all individual defendants on the sections 1 and 2 claims.

Since the district court's order certifying the "special verdict" pursuant to Rule 54(b) does not distinguish what decisions have been certified, we assume that the court intended to certify every *final* judgment that resulted from the special verdict, including those against the plaintiff and the plaintiff class. It would therefore seem that, because the plaintiff filed his notice of appeal within thirty days of the Rule 54(b) certification, the judgments listed are properly before us.

There is, however, one potential problem of jurisdiction over the plaintiffs' cross-appeal. Rule 54(b)

certification was sought by the defendants, and actively opposed by the plaintiff. The district court granted the certification, but its order did not indicate which "judgments" it intended to certify. Thus it may be that the certification brings up only those claims on which a final decision was entered against the defendants. But all of the potentially appealable decisions in this case are against the plaintiff. Apparently the defendants (and the district court) thought that the Rule 54(b) certification would make the claims on which the plaintiff won on the liability issue, but for which the question of damages had not yet been tried, appealable, a belief we have shown to be erroneous. Had the defendants realized that their rule 54(b) certification motion would accomplish nothing for them, but might result in bringing up for review judgments in their favor which plaintiffs had not initially sought to have have reviewed at that stage, they might not have sought a Rule 54(b) certification. The question, then, is whether the combination of the "blanket" Rule 54(b) certification issued at the *defendant's* request and over the plaintiffs' opposition, and the plaintiffs' cross-appeal, are sufficient to bring before us the final decisions against the plaintiffs.

We have been unable to find any cases or treatises that discuss the efficacy of a Rule 54(b) certification issued at the behest of a party against whom there are no final judgments, or by the district court *sua sponte*. We nevertheless conclude that the policy of Rule 54(b) to permit immediate appeals from final decisions in complex litigation renders the district court's Rule 54(b) certification efficacious under the circumstances of this case, i.e., where: (1) the plaintiffs' appeal is from several *final* decisions; (2) the parties have briefed and argued the legal questions already; and (3) we have to review the propriety of the injunction which is based on the same factual

circumstances as the various final judgments against the plaintiffs and involves most of the same legal issues. The plaintiffs' cross-appeal is thus properly before us.[29]

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29. The final judgments entered against plaintiff Weiss are:

- on the section 1 claim: in favor of York, the staff, and all individual defendants;
- on the section 2 claim: in favor of the staff and all individual defendants;
- on the state law claims: in favor of the staff and Doctors Ardison, Kline, Laucks, MacDougall, MacKenzie, and Whiteley.

The final judgments entered against the plaintiff class are:

- on the section 1 claim: in favor of York and all individual defendants;
- on the section 2 claim: in favor of the staff and all individual defendants;
- on the state law claims: the class made no state law claims.

We affirm all the dismissals as to the individual defendants because we believe the evidence supports the jury's conclusions on these claims. We also affirm the dismissal of Weiss' and the class' section 2 claims, against the medical staff, on the same ground. We reverse the dismissal of Weiss' section 1 claim against the medical staff for the reasons stated *infra* text accompanying notes 52-63. Finally, we affirm the dismissal of Weiss' and the class' claims against York because we believe that these decisions are also supported by evidence in the record. We note however that exoneration of York Hospital on the section 1 claims does not necessarily result in the dismissal of the action as to York. The medical staff (which the jury found liable on section 1 grounds, and which decision we affirm, *see infra* text accompanying notes 43-66) does not exist independent of the hospital, and therefore the hospital may be liable to pay any award of money damages in favor of the plaintiffs and against the staff under section 4 which may result in the future, on a respondeat superior theory of liability. We leave this question to another day.

C. *Class Certification*

The district court granted the plaintiff's motion for class certification, determining that the action could be maintained pursuant to Fed. R. Civ. P. 23(b)(2) on behalf of a class of all osteopathic physicians practicing medicine in the York MSA. The defendants attack the class certification on several grounds.

1. *The Necessity of Proof of Demand*

The defendants contend that the law of this Circuit is "clear" that where a claim is based upon an unlawful refusal by defendant to deal with the plaintiff, that plaintiff -- and hence each class member -- must allege and prove a demand which the defendant rejected. In support of this proposition the defendants cite *Mazus v. Dept. of Transportation, Commonwealth of Pa.*, 629 F.2d 870 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), and *Lawlor v. Nat'l Screen Service Corp.*, 270 F.2d 146, 154 (3d Cir. 1959), *cert. denied*, 362 U.S. 922 (1960). But we are not here faced, as in those cases, with the question whether each member of the class must have made a demand and have been rejected in order to obtain *damages* from the defendants (that question is posed by the dismissed appeals). We thus find these cases to be inapposite to the limited issue before us on these appeals -- i.e., whether the law requires as a prerequisite to *injunctive* relief that each member of the (b)(2) class have had an application for staff privileges rejected by the hospital.[30] We thus turn to analysis of the question.

A private antitrust claim has two parts. A plaintiff must demonstrate "a violation of the antitrust laws" -- in this case sections 1 and 2 of the Sherman Act -- and

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30. We reserve the question of the right of class members to recover treble damages under section 4 of the Clayton Act in the absence of a demand. *See infra* note 32.

he must also prove the right to either the treble damage remedy given by section 4 of the Clayton Act or the equitable remedy afforded by section 16 of that Act. *See Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). *Cf. Double H Plastics, Inc. v. Sonoco Products Co.*, 732 F.2d 351 (3d Cir. 1984) (Gibbons, J., dissenting). In a case challenging market exclusion under section 1 of the Sherman Act, the formation of a conspiracy with the requisite exclusionary purpose forms the essence of the violation. *See generally Silver v. New York Stock Exchange*, 373 U.S. 341, 347 (1963); *Associated Press v. United States*, 326 U.S. 1 (1945); *American Medical Association v. United States*, 317 U.S. 519 (1943). Similarly, under section 2 of the Act, it is the willful acquisition or maintenance of monopoly power that is the essence of the offense. *See generally Otter Tail Power Co. v. United States*, 410 U.S. 366, (1973). *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912). In both instances, the violation is based on the defendant's conduct, rather than on the effect on the plaintiff. On the question of appropriate relief under section 4 or 16, however, effect on the plaintiff becomes critical. This is demonstrated by a comparison of the language of the two sections and the caselaw thereunder.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

As in the case of common-law torts, the right to antitrust damages is limited to those plaintiffs who can demonstrate a causal relationship between the defendants' unlawful conduct and their economic injury. *See Perkins v. Standard Oil Co. of California*, 395 U.S. 642, 648-49, (1969).[31]

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . .

In contrast to section 4, section 16 contains no requirement that a plaintiff prove actual injury to his business or property caused by the antitrust violation. Instead, section 16 authorizes injunctive relief for any person who demonstrates "threatened loss or damage by a violation of the antitrust laws." Thus it is generally said that section 16 imposes a lower threshold "standing" requirement on a plaintiff than does section 4. *See, e.g., Bogus v. American Speech &*

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31. Moreover, even beyond the requirement of causation, the federal courts, where "pervasive reasons of antitrust policy" warrant, have fastened certain artificial limitations upon the plaintiff's right to recover treble damages. *See generally* Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454-55 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). For example, in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the court concluded that, in view of the potential for duplicative recoveries and problems of proof, the right to recover damages for price fixing should generally be confined to the direct purchasers of the price-fixed products.

Hearing Ass'n, 582 F.2d 277, 288 (3d Cir. 1978); L. Sullivan, *Handbook of the Law of Antitrust* § 247, at 772 (1977). The courts have applied section 16 "more expansively, both because its language is less restrictive than that of section 4, . . . and because the injunctive remedy is a more flexible and adaptable tool for enforcing the antitrust laws than the damage remedy." *Bogus*, 582 F.2d at 288-89; *see Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251, 261-62 (1972); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 131 (1969).

In *Zenith Radio Corp.*, 395 U.S. at 130, the Supreme Court reversed a court of appeals decision setting aside the district court's grant of injunctive relief stating:

> The evident premise for striking [the injunctive relief] was that Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, for § 16 of the Clayton Act, 15 U.S.C. § 26, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury; . . . he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur . . . .
>
> Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the

> antitrust laws . . . . Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." . . . Its availability should be "conditioned by the necessities of the public interest which Congress has sought to protect."

Zenith, 395 U.S. at 130-131 (footnote omitted). *See also Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 589-94 (3d Cir. 1979) (court held that the *Illinois Brick* direct purchaser rule did not preclude an indirect purchaser from obtaining injunctive relief against price fixing under section 16 of the Clayton Act.)

In view of the differences between sections 4 and 16, especially as explicated in *Zenith*, we conclude that the question whether a defendant has violated sections 1 and/or 2 of the Sherman Act is independent of the question whether each class member must have made a "demand" for staff privileges in order to obtain an injunction and/or treble damages; and that the putative demand requirement is only relevant (if at all) to a plaintiff's right to claim treble damages once a violation has been established. Even if there is no actionable injury in the absence of a D.O.'s demand for hospital privileges (and refusal), there is threatened injury, for the jury found that York hospital and its medical staff had adopted a discriminatory policy towards D.O. applicants for staff privileges, and the court found as a fact that "[t]he denial of hospital staff privileges to a physician . . . is a serious adverse professional event which is likely to besmirch the professional reputation of such a physician." *Weiss*, 548 F. Supp. at 1052 (finding of fact No. 29). In this

factual situation, it would be fundamentally inconsistent with section 16's stated purpose of providing relief against "*threatened loss*" to require that each member of the plaintiff class have made a demand for staff privileges as a prerequisite to obtaining injunctive relief. A contrary conclusion would result in a rule requiring the class to suffer *actual* harm (besmirching of their professional reputations resulting from denial of their applications) caused by the defendants' antitrust violations in order to qualify for injunctive relief against *threatened* harm from the same violations. That result is unacceptable.[32]

We therefore hold that where the plaintiff class is a (b)(2) class -- i.e., one that seeks primarily injunctive relief -- a demand by each member of the class is not a prerequisite to injunctive relief, at least where the plaintiffs have established that the denial of a physician's application for staff privileges is injurious to the physician's professional reputation.

2. *The Requirements of Fed. R. Civ. P. 23*

As we noted above, the district court, pursuant to Fed. R. Civ. P. 23, certified Weiss as the representative of the class of all osteopathic physicians in the York MSA. The defendants challenge that certification on two grounds: first that the plaintiff and plaintiff class do not satisfy the four threshold requirements for class action certification contained in Rule 23(a), and second that the district court improperly certified the plaintiff class as (b)(2) class. We address these contentions in turn.

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32. We express no view as to whether a demand is required in non-(b)(2) class situations. Nor do we decide whether the individual members of a (b)(2) class must prove a demand and refusal in order to recover treble damages under section 4 of the Clayton Act. That matter will have to be resolved in a subsequent phase of this case.

a. *Rule 23(a)*

Fed. R. Civ. P. 23(a) contains the threshold requirements for the maintenance of any type of class action. The Rule provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

For the reasons that follow, we conclude that the plaintiff class in this case satisfied the four requirements of Rule 23(a).[33]

(i) *Numerosity*

The first requirement is that the class must be so numerous that joinder of all members is impracticable. The defendants argue that because there are approximately 92 members in the class, all class members live and work in the York MSA, and all class members can be identified with "minimal effort" and joined in this action with "minimal inconvenience."[34]

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33. The scope of review of an order denying or granting a motion to maintain a class is narrow. "If the district court properly applies the relevant criteria, we may reverse its order only for an abuse of discretion." Mazus v. Dept. of Transp., Commonwealth of Pa., 629 F.2d 870, 876 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *see* Paton v. La Prade, 524 F.2d 862, 875 (3d Cir. 1975); Katz v. Carte Blanche Corp., 496 F.2d 747, 756-57 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974).

34. Weiss v. York County Hospital, Civ. No. 80-0134, at 3 (M.D. Pa. filed 3/28/81) (findings of fact Nos. 8-10) [App. at 1507a].

the numerosity requirement has not been satisfied. The district court gave two reasons for reaching the contrary conclusion. First, the court noted that the primary relief sought by plaintiffs was injunctive, and stated that in such cases a "strict application (requiring the class to consist of hundreds or more persons) of the numerosity requirement is unwarranted." *Weiss v. York County Hospital*, Civ. No. 80-0134, at 9-10 & 19 (M.D. Pa. filed 3/28/81) [App. at 1513a-1514a, 1523a], *citing Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 276 (10th Cir. 1977) (class of 46 employees of defendant satisfies numerosity requirement where primary relief sought is injunctive) and *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975) (class of 48 prisoners seeking injunctive relief upheld). Second, the district court concluded that the "individual interest in controlling this litigation is minimal." We agree with the district court that the numerosity requirement is satisfied in this case.

In most cases where a plaintiff seeks injunctive relief against discriminatory practices by a defendant, the defendant will not be prejudiced if the plaintiff proceeds on a class action basis, as opposed to an individual basis, because the requested relief generally will benefit not only the claimant but all other persons subject to the practice under attack. 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1771, at 663-64 (1972). A judicial determination that a particular practice infringes upon protected rights and is therefore invalid will prevent its application by the defendant against many persons not before the court. Thus rigorous application of the numerosity requirement would not, as the district court noted, appear to be warranted. Also supporting this view is the fact that, as this case demonstrates, and as the district court observed, generally speaking, individual

interest in pursuing litigation where the relief sought is primarily injunctive will be minimal. *Id.* Weiss demonstrated an obvious commitment vigorously to pursue the antitrust claim against the defendants. This commitment apparently did not escape the other D.O.s in the York MSA because no D.O. sought to intervene in the lawsuit or otherwise challenge Weiss' leadership.

Given our conclusion that the interests of the plaintiff class and the interests of the defendants will not be affected significantly by permitting Weiss to maintain this class action, we agree with the district court that a strict application of the numerosity requirement is not required here. Consequently, the district court did not abuse its discretion in concluding that the class of 92 D.O.s who work in the York MSA was sufficiently numerous to satisfy the requirements of Rule 23(a)(1). Of course, 92 class members might be enought in any event.[35]

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35. On the subject of how many is enough, Professor Moore has written:

> While the attitude taken towards a given number may vary, each opinion reflects a practical judgment on the particular facts of the case. Thus no hard and fast number rule can or should be stated, since "numerosity" is tied to "impracticability" of joinder under the specific circumstances. Nevertheless, some general tendencies can be observed. While there are exceptions, numbers under twenty-one have generally been held to be too few. Numbers between twenty-one and forty have evoked mixed responses and again, while there are exceptions, numbers in excess of forty, particularly those exceeding one hundred or one thousand have sustained the requirement.

3B J. Moore, Moore's Federal Practice ¶ 23.05[1], at 23-150 (2d ed. 1982) (footnotes omitted).

(ii) *Commonality*

Rule 23(a)(2) requires that there be questions of law or fact common to the class, although not all questions of law or fact raised need be in common. 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1763, at 603 (1972). The district court concluded that all class members were in a "substantially identical factual situation" and that the "questions of law raised by the plaintiff are applicable to each [class] member." While we concede that some questions have been raised with respect to Dr. Weiss that might not be raised with respect to other members of the class, i.e. the allegations of lack of professional competence and conduct, common questions by far predominate especially with respect to the claim for injunctive relief, hence we conclude that the second requirement of Rule 23(a) has been met. This case will have to be remanded for trial of the competence and conduct defenses of such damage claims as Weiss and members of the class may assert. There is no inconsistency between class certification, particularly (b)(2) class certification, and the individual trial of damage claims which may present disparate issues. *See Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84 (3d Cir. 1979).

(iii) *Typicality*

Defendants also argue that Weiss' claims are not typical of the class. Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. The meaning of this requirement has historically been somewhat elusive.[36] However, Weiss' claims are plainly

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36. Professor Moore has concluded that there is no need for this subsection at all, "since all meanings attributable to it duplicate requirements prescribed by other provisions in Rule 23." 3B J. Moore & J. Kennedy, *Moore's Federal*

Practice ¶ 23.06-2, at 23-185 (2d ed. 1982). Some courts have equated typicality with commonality, while others have held that it is more akin to the Rule 23(a)(4) requirement that the representative party adequately protect the interests of the class. 4 *Newberg on Class Actions* § 7983. *See* 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1764 (1972) and cases cited therein. Still other courts and commentators have attempted, quite correctly we think, to ascribe an independent meaning to Rule 23(a)(3) and have posited various tests by which the court may determine whether the prerequisite has been met. A widely utilized formulation has been that advanced in 7 Wright and Miller, *supra*, § 1763, at 614:

> . . . [P]laintiff has satisfied Rule 23(a)(3) if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory. Of course, when this is true the standard under subdivision (a)(3) is closely related to the test for the common-question prerequisite in subdivision (a)(2). On the other hand, Rule 23(a)(3) may have independent significance if it is used to screen out class actions when the legal or factual position of the representatives is markedly different from that of other members of the class even though common questions of law or fact are raised.

This approach focuses on the legal and/or factual stance assumed by the class representative as compared with that of the class members. Under this approach, while factual variations will not defeat certification where the various claims arise from the same legal theory, where the named plaintiff's individual circumstances are markedly different or where the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based, there exists the danger that the unique circumstances or legal theory will receive inordinate emphasis and that the other claims will not be pressed with equal vigor or will go unrepresented. Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 489 (N.D. Cal. 1978); Karan v. Nabisco, Inc., 78 F.R.D. 388, 405 (W.D. Pa. 1978);

Cohen v. Uniroyal, Inc., 77 F.R.D. 685, 691-92 (E.D. Pa. 1977). ("[M]ere anticipation that all class members will benefit from the suit . . . is not enough. But interests sufficiently parallel to ensure a vigorous and full presentation of all potential claims for relief should satisfy Rule 23(a)(3)"). *See* Scott v. University of Delaware, 601 F.2d 76, 84 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979). Illustrative of this approach is Donaldson v. Pillsbury Co., 554 F.2d 825 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977), in which the court described the typicality prerequisite variously as a requirement that there be other members of the class who have the *same or similar grievances*, *id.* at 830; that the charge be based on patterns or practices *not special or unique* to plaintiff, *id.* at 831; that a significant number of other members of the class have been *similarly victimized by the same patterns or practices*. *Id.*

The approach of *Donaldson* and of other courts adopting the Wright and Miller formulation thus appears to be an attempt to attribute semantic integrity to the term "typicality," by using what is essentially its common sense definition and positing that where the plaintiff's factual or legal stance is not characteristic of that of other class members, the typicality prerequisite has not been met. In something of a variation of the above analysis, other courts have held that in order to satisfy the typicality requirement, plaintiff must show that the issues of law or fact he or she shares in common with the class occupy "the same degree of centrality" to his or her claims as to those of unnamed class members. Parker v. Bell Helicopter Co., 78 F.R.D. 507 (N.D. Tex. 1978); Cottrell v. Virginia Electric & Power Co., 62 F.R.D. 516 (E.D. Va. 1974); *see* Wofford, 78 F.R.D. at 489. A similar formulation is the "nexus text." *See* Hannigan v. Aydin Corp., 76 F.R.D. 502, 508 (E.D. Pa. 1977), a Title VII case where Chief Judge Joseph S. Lord, III wrote that typicality exists where plaintiff has demonstrated some "nexus" with the claims of other class members, which can be shown by demonstrating the similarity between the conditions of employment of plaintiff and those of other class members, the similarity between the alleged discrimination practices on the named plaintiff and that affecting the class, and by the compatability of the relief requested and that appropropriate for the class.

"typical" of the claims of the class whichever of the several approaches to the meaning of this term is used. The essential legal claim of all the plaintiffs, including Weiss, is that they are osteopathic physicians who can not obtain staff privileges at York because of a scheme by the M.D.s who control admissions at York to exclude them in violation of the antitrust laws. In addition the factual matrix that suggests this legal claim is the same for all the plaintiffs, again including Weiss.

Defendants argue that *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) requires the conclusion that plaintiffs' claims are atypical of the class' claims:

> There are obviously two disparate groups subsumed in the class certified below: the osteopathic physicians who have not applied for staff privileges, allegedly dissuaded by fear, and the one applicant who applied and was rejected. . . . [under *Falcon*], Weiss could not be the class representative for the former group, and the two groups could not be encompassed in the same class.

Defendants' Brief at 26. This argument fails for two reasons. First, the Supreme Court in *Falcon* did not hold that the plaintiff could not represent the class; the Court merely held that the requirements of Rule 23(a) are not waivable in a Title VII case, and therefore that the plaintiff had to make the required presentation demonstrating that he satisfied the requirements of

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We view the "centrality" and "nexus" tests as functionally indistinguishable from the Wright-Miller/*Donaldson* "marked difference" formulation: each test attributes to the typicality requirement what we have termed a semantic integrity by focusing on its dictionary or common sense meaning. We see no point in attempting an additional formulation, for we could not improve on the foregoing.

that rule.[37] Weiss made the required presentation in this case and the district court found that the class was sufficiently numerous, that there was a commonality of issues, that the plaintiff's claims were typical of the class' claims, and that the plaintiff would adequately represent the class' interests. Therefore, *Falcon* is inapposite. Second, defendant's dichotomy between those who have applied and been rejected and those who are afraid to apply is not enough to carry the day, for, in essence, there is only one class advanced in this case -- the osteopathic physicians in the York MSA who are the intended victims of York's discriminatory admissions policy. Thus, as we have stated, the typicality requirement is met in this case.

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37. In *Falcon*, a Mexican-American employee filed suit in federal court under Title VII claiming racial discrimination in defendant's refusal to promote him. Without conducting a hearing on whether the prerequisites of Rule 23(a) were met, the district court, pursuant to the Fifth Circuit's rule permitting the victim of racial discrimination in employment to maintain an "across-the-board" attack on all the employer's racially discriminatory policies, certified a class consisting of Mexican-American employees of the employer and Mexican-American applicants who had not been hired by the employer. The Supreme Court rejected the contention that the requirements of Rule 23(a) could be by-passed in Title VII cases. Instead, the Court held that the requirements of Rule 23(a) "limit the class claims to those fairly encompassed by the named plaintiff's claim." 457 U.S. at 156 (citing General Telephone Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 330 (1980)). The Court went on to hold that it was error for the district court to presume "[w]ithout any specific presentation identifying the questions of law or fact that were common to the claims of [the plaintiff] and of the members of the class he sought to represent," that the plaintiff's claims against the employer were typical of the claims of other Mexican-American employees and applicants. *Id.* at 158.

(iv) *Adequacy of Representation*

The fourth and final part of the Rule 23(a) test requires that the plaintiff must adequately represent the interests of the class.

> Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.

Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). The quality and experience of plaintiff's counsel is conceded by the defendants. In addition, Weiss testified before the district court that he was willing and able (both financially and otherwise) to pursue this litigation, and that he could perceive no conflict of interest between himself and any class member. The district court concluded that Weiss would fairly and adequately represent the class. We agree and therefore conclude that the requirements of subsection (a)(4) have also been satisfied.

b. *Rule 23(b)(2)*

The defendants also challenge the propriety of the district court's certification of a (b)(2) plaintiff class;[38] however, their objections are based on the failure of class members to have made a demand for staff

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38. Fed. R. Civ. P. 23(b)(2) provides:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . . .

privileges at York and on their contention that the requirements of Rule 23(a) have not been met. Since we have already decided both these contentions adversely to the defendants, we simply note that the class in this case is a classic (b)(2) class in that the defendants have "acted or refused to act on grounds generally applicable to the class" and the primary relief sought is an injunction against future discrimination. When a suit seeks to define the relationship between the defendant(s) and the world at large, as in this case, (b)(2) certification is appropriate. Thus we affirm the district court's class certification decision.

D. *The Vicinage Requirement Of 28 U.S.C. § 1393(a)*

The final preliminary issue is the defendants' contention that the district court erred in holding the trial in this case at the Lewisburg/Williamsport courthouse rather than the Harrisburg courthouse.[39] The defendants contend that they had a statutory right pursuant to 28 U.S.C. § 1393(a) to be tried in Harrisburg. Section 1393(a) provides:

> (a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides.

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;
>
> . . . .

39. The trial in this case was held at the Lewisburg/Williamsport Courthouse because the district court determined that no courtrooms were available in the Harrisburg courthouse during the time scheduled for the trial.

Unlike numerous districts, the Middle District of Pennsylvania has not been subdivided by Congress into divisions. The Middle District has, however, been divided into a number of subdivisions by local court rule. All the defendants in this case reside in the Harrisburg subdivision, and they contend that section 1393(a) gives them the right to be tried there,[40] and that the district court erred when it held the trial of this action in the Lewisburg/Williamsport division over their objection.[41]

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40. We note that by its express terms section 1393(a) does not appear to apply to this case because this suit is not against a "single defendant," but against multiple defendants. However, the section has been applied by several district courts to cases where multiple defendants all reside in the same division. *See, e.g.*, McCroskey v. Texas Marine Survey Co., Inc., 87 F.R.D. 691 (S.D. Tex. 1980); Roark v. Bauer, 181 F. Supp. 330 (N.D. Ohio 1960); Lavietes v. Ferro Stamping & Mfg. Co., 19 F. Supp. 561 (E.D. Mich. 1937); Barfield v. Zenith Tire & Rubber Co., 9 F.2d 204 (N.D. Ohio 1924); *see generally* 1 J. Moore, *Moore's Federal Practice* ¶ 0.143[4], at 1466 (2d ed. 1984); *see also* Torres v. Continental Bus System, Inc., 204 F. Supp. 347 (S.D. Tex. 1962) (statute applies to a corporate defendant that is a resident of the division). Because we hold that section 1393 applies only to congressionally created divisions, we need not decide here whether we would extend the statute to cases involving multiple defendants.

41. In order to demonstrate that they were substantially harmed by having the trial held at Lewisburg/Williamsport rather than Harrisburg the defendants point to 28 U.S.C. § 1861, which guarantees all litigants the right to a trial before a jury "selected at random from a fair cross section of the community in the district or division wherein the court convenes." The defendants argue that, if the trial had taken place in Harrisburg as allegedly required by 28 U.S.C. § 1393(a), they would have had a jury from the Harrisburg area -- one "drawn from a community containing the diversity of minority groups who inhabit both York itself and the Harrisburg Division, but [] not found in any substantial number in the rural counties from which juries

Section 1393(a) does provide that a defendant must be tried in the division of the district court wherein he resides: however, the the statute only applies where the "divisions" have been created by *legislative* action. *See Jenner v. Murray*, 32 F.2d 625 (5th Cir. 1929) (construing predecessor statute to present section 1393); *Patrick Jobbing Co. v. Globe & Rutgers Fire Ins. Co.*, 21 F.2d 106 (W.D. Va. 1927) (same). The Harrisburg division involved in this case was created by court rule not by legislative action. A federal rule of civil procedure promulgated by the Supreme Court cannot and does not affect venue. 1 J. *Moore, Moore's Federal Practice* ¶ 0.143[3], at 1464 (2d ed. 1984). *A fortiori* a local district court rule is similarly limited. *See id.* Because the Middle District of Pennsylvania has no legislatively created divisions, *see* 28 U.S.C. § 118, section 1393's venue provisions are irrelevant to trials conducted there, and the defendants' vicinage claim must be rejected.[42]

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in Lewisburg and Williamsport are drawn." Defendants' Brief, at 64 -- and that, with such a jury the outcome of the trial might well have been different.

42. Local Rule 407.1 of the Middle District Rules does not require a different result. Rule 407.1, which is merely precatory, provides that the trial should be held as close as practical to the defendant's place of residence or principal place of business. Local Rule 407.3 provides that "notwithstanding any other provisions of this Rule, in all actions the court shall have the right to designate the place of trial for the convenience of the court or of all the parties and witnesses." In this case the district court attempted to accommodate the convenience of all concerned. Trial was scheduled for Lewisburg/Williamsport only after the district court determined that no courtroom was available in Harrisburg. Its decision in this regard certainly cannot be characterized as an abuse of discretion.

Our conclusion that the district court did not err as a matter of law in trying the case in Williamsport should not, of course, be taken as a suggestion that the ensuing phase of the trial also be tried in Williamsport as opposed to Harrisburg.

III. *THE SHERMAN ACT CLAIMS*

We now turn to the substantive-law questions presented by this appeal. In part A of this section, we deal with the appeal from the district court's conclusion that the medical staff is liable to the class under section 1 of the Sherman Act; in part B, we discuss the hospital's appeal from the finding of liability against it under section 2 of the Sherman Act; and in part C, we review the propriety of the injunction issued against both the medical staff and the hospital.

A. *Section 1 of the Sherman Act*

In order to establish a violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), a plaintiff must establish three elements: (1) a contract, combination, or conspiracy; (2) restraint of trade; and (3) an effect on interstate commerce. Each of these three elements has been the subject of extensive analysis by the courts, and we now turn to a discussion of that caselaw and its application to the facts of this case, taking the elements up in turn.

1. *Proof of an Agreement: Is There a Sufficient Number of Conspirators?*

In order to establish a violation of section 1, a plaintiff must prove that two or more distinct entities agreed to take action against the plaintiff. Before the district court, Weiss contended that the hospital and its medical staff were legally distinct entities and therefore capable of conspiring in violation of section 1. He also asserted that the doctors who joined together to form the medical staff were separate economic entities who competed against each other so that, as a matter of law, the medical staff was a "combination" of doctors within the meaning of section 1. Finally, Weiss argued that even if the individual doctors who made up York's medical staff were deemed by the court to be the equivalent of "officers or employees" of the hospital and

therefore ordinarily not capable of conspiring with the hospital, nevertheless the doctors were acting for their own benefit in discriminating against osteopaths, and therefore fell within an exception to the ordinary rule that "officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731, 2741 (1984).[43]

The defendants countered that York and its medical staff were legally one entity and therefore incapable of conspiring. In addition the defendants asserted that the individual doctors who made up the medical staff were the equivalent of "employees or officers" of the hospital and hence legally incapable of conspiring with the hospital. Finally the defendants asserted that they had not discriminated against osteopaths and therefore that the putative exception to the general rule did not apply in this case.

The district court concluded, and instructed the jury, that the medical staff was an "unincorporated division" of the hospital, and as such the two were legally a "single entity" incapable of conspiring. In addition, the court instructed the jury that the hospital, as a corporation, could act only through its "officers and and agents," and that in proving that

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43. If corporate officers or employees act for their own interests, and outside the interests of the corporation, they are legally capable of conspiring with their employer for purposes of section 1. *See* Johnston v. Baker, 445 F.2d 424, 426-27 (3d Cir. 1971); *see also* H & B Equipment Co., Inc. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); Greenville Publishing Co., Inc. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974). In *Copperweld* the Supreme Court noted this exception but did not otherwise comment on it. 104 S. Ct. at 2741 n.15. Because the jury did not find any of the named individual defendants to be conspirators, we do not have occasion to discuss this exception further.

York had so acted, the plaintiffs had not shown the existence of a "contract, combination . . . or conspiracy."[44] The court also instructed the jury, however, that if they found that some or all of the individual defendants took action against the plaintiffs "in whole or in part in their individual capacities and motivated in whole or part by independent personal economic interests, then such individual-named defendants are, under the law, independent economic entities . . . [and therefore are] legally capable of conspiring with York Hospital or its Medical and Dental Staff." App. at 5686a.

In response to these instructions, the jury answered the following special verdict question in the affirmative:

> 11. Did any of the Defendants conspire with any other person or persons, entity or entities, whether or not a Defendant, to deny or impede reasonable, fair, equal or full access to staff privileges at York Hospital by osteopathic physicians other than Plaintiff Weiss?

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44. The district court instructed the jury:

> York Hospital is a corporation and as such it can act only through its employees, officers or representatives. The York Hospital does not violate the Sherman Act if it exercises its rights through its officers and agents, which is the only medium through which it can possibly act; likewise the corporation cannot conspire with its unincorporated division here, the medical and dental staff of the York Hospital.
>
> Thus I instruct you that York Hospital and the Medical and Dental Staff of York Hospital must be regarded by you as a matter of law as a single entity which cannot conspire with itself.

App. at 5685a.

App. at 6247a. However, when requested by special verdict question number 13 to check the names of the defendants who so conspired, the jury checked only the single name: "York Hospital Medical and Dental Staff."[45] On the basis of these answers, the district

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45. Special Verdict No. 13 took the following form:

> 13. If your answer to the previous question is "yes," check the name or names of the Defendants listed below who were involved in that conspiracy.
>
> | | |
> |---|---|
> | York Hospital | ___ |
> | York Hospital Medical and Dental Staff | X |
> | Gary Ardison, M.D. | ___ |
> | Thomas L. Bauer, M.D. | ___ |
> | Ivan L. Butler, M.D. | ___ |
> | S.W. Deisher, M.D. | ___ |
> | Jack A. Kline, M.D. | ___ |
> | Lois Kushner, M.D. | ___ |
> | S. Philip Laucks, M.D. | ___ |
> | Harold H. MacDougall, M.D. | ___ |
> | Iain L. MacKenzie, M.D. | ___ |
> | John P. Whiteley, M.D. | ___ |

App. at 6250a. It would appear that since the court instructed the jury that the hospital was one in the same with the medical staff and that therefore it was legally impossible for the two to conspire, it was internally inconsistent to provide one space to be checked for York Hospital and a separate space for the York Hospital Medical and Dental Staff.

The jury also believed that the defendants had conspired against plaintiff Weiss:

> 7. Did any of the Defendants conspire with any other person or persons, entity or entities, whether or not a Defendant, to deny Plaintiff Weiss staff privileges at the York Hospital because Weiss was an osteopathic physician?
>
> Answer: Yes.

court held the defendant medical staff liable to the plaintiff class under section 1. On the question who conspired with the medical staff, the court stated only:

> The York Hospital Medical and Dental Staff conspired with another person or entity to deny or impede reasonable, fair, equal, and full access to staff privileges at York Hospital by osteopathic physicians other than Plaintiff Weiss.

Weiss, 548 F. Supp. at 1051 (finding of fact No. 8).[46]

The defendants appeal the district court's finding that there was a "conspiracy." They note that all the individual defendants and the hospital itself were exonerated from liability under section 1, and that because "there is no evidence in the record identifying any possible 'co-conspirator'" other than the individual defendants and the hospital, the finding that the medical staff engaged in a "conspiracy" is erroneous.[47]

App. at 6243a. However, because the jury concluded that the conspiracy against Weiss did not unreasonably restrain interstate commerce, Special Verdict No. 8, the jury was not required to answer Special Verdict No. 10, which asked them to identify the conspirators.

46. Based on the jury's answers to Special Verdict Nos. 13 & 8, the court in its conclusion of law No. 5 stated: "The individual Defendants have not violated the antitrust laws." *Weiss*, 548 F. Supp. at 1061.

47. Whether antitrust defendants have engaged in a "contract, combination or conspiracy" to restrain trade is a question of fact. *See* Theatre Enterprise v. Paramount Film Distributing Corp., 346 U.S. 537, 541-42 (1954); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939). If there is evidence supporting the jury's finding of a conspiracy, we must affirm. *See* Dawson v. Chrysler Corp., 630 F.2d 950, 959 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

The plaintiffs cross-appeal arguing that the district court's jury instruction concerning the capacity of the medical staff to conspire with itself and with York hospital was erroneous.

We agree with the plaintiffs that, as a matter of law, the medical staff is a combination of individual doctors and therefore that any action taken by the medical staff satisfies the "contract, combination, or conspiracy" requirement of section 1. Any error created by the district court's jury charge on the requirements for a "conspiracy," however, was harmless because the jury found that a conspiracy did exist. In addition, because the medical staff itself is a combination as a matter of law, we conclude that the absence of evidence of any other co-conspirator(s) is irrelevant. We do, however, agree with the district court that the hospital cannot legally conspire with its medical staff.

Antitrust policy requires the courts to seek the economic substance of an arrangement, not merely its form. *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731, 2738, 2739-40, 2744 (1984); *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227-228 (1947); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360-61, 376-77 (1933).[48] The "substance" of an arrangement often depends on the economic incentive of the parties. The York medical staff is a group of doctors, all of whom practice medicine in their

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48. Utilizing this principle, the Supreme Court, in *Copperweld*, explained why a corporation and its wholly owned subsidiary could not legally conspire:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the

individual capacities, and each of whom is an independent economic entity in competition with other doctors in the York medical community. Each staff member, therefore, has an economic interest separate from and in many cases in competition with the interests of other medical staff members. Under these circumstances, the medical staff cannot be considered a single economic entity for purposes of antitrust analysis.

In the past, the Supreme Court has had occasion to address the problems created by cooperative ventures among otherwise competing entities in a single market. *See Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Associated Press v. United States*, 326 U.S. 1 (1945). Both the AP and NYSE are organizations which serve an economically useful purpose: the AP allows smaller newspapers to combine their resources for the purpose of collecting, assembling, and distributing news; NYSE provides an organized market for the purchase and sale of securities. Yet in both cases, the fact that the defendant organization was a combination of otherwise competing entities was deemed sufficient to satisfy the "contract, combination, . . . or conspiracy" requirement of section 1.[49]

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control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Copperweld, 104 S.Ct. at 2742.

49. In Associated Press v. United States, 326 U.S. 1 (1945), the Court did not discuss, and indeed seemed to think it was indisputable that the requisite joint action for section 1 purposes was present. However the Court did expressly state that:

Two recent Supreme Court cases reaffirm that a single entity made up of independent, competing economic entities satisfies the joint action requirement of Sherman Act section 1. In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), the defendants, the Maricopa Foundation for Medical Care and the Pima Foundation for Medical

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> The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* "enterprise and sagacity"; such hampering of business rivals can only be attributed to that which really makes it possible - the collective power of an unlawful combination.

326 U.S. at 15 (emphasis in original). In Silver v. New York Stock Exchange, 373 U.S. 341 (1963), the Court, on the issue of joint action, stated only:

> The concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market.

373 U.S. at 347.

We acknowledge that there are factual distinctions between *Silver* and *Associated Press* on the one hand, and this case on the other. York Hospital is more than simply an association of doctors; it is a separate economic entity which provides services separate from those provided by the doctors on the medical staff. This case, however, involves only the question of the medical staff's decision about which doctors would be allowed to practice at York. For these purposes, we believe that the principles of *Silver* and *Associated Press* are applicable.

Care, were non-profit Arizona corporations composed of licensed doctors of medicine, osteopathy, and podiatry engaged in private practice. The Foundations were "organized for the purpose of promoting fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans." *Id.* at 339. The Court simply assumed without discussion that the actions of each foundation satisfied the "contract combination . . . or conspiracy" element of section 1. Similarly, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the defendant, an association of professional engineers organized to deal with "the nontechnical aspects of engineering practice," *id.* at 682, had adopted an ethics canon prohibiting competitive bidding. Once again the Court simply assumed, without discussion, that the defendant was a combination of its members. *See also Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 479-481 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (Blue Shield of Virginia deemed an agent under the direction and control of its member physicians, and therefore its actions were that of a "combination" for section 1 purposes).

On the basis of these cases, we believe that the actions of the York medical staff are the actions of a combination of the individual doctors who make it up. In substance, the medical staff is a group of individual doctors in competition with each other and with other physicians in the York MSA, who have organized to regulate the provision of medical care at York hospital. Where such associations exist, their actions are subject to scrutiny under section 1 of the Sherman Act in order to insure that their members do not abuse otherwise legitimate organizations to secure an unfair advantage over their competitors.

The foregoing summary does not, however, end our discussion on this point, for we must consider whether errors in the district court's charge harmed any of the parties. The district court instructed the jury that "York Hospital and the Medical and Dental Staff of York Hospital must be regarded by you as a matter of law as a single entity which cannot conspire with itself." App. at 5685a. To the extent that this instruction indicates that the medical staff must be considered a single entity for antitrust purposes, it is at variance with our holding that the medical staff is a combination of the individual doctors who make it up. The plaintiffs, however, were not harmed by this error. In answer to the special verdict questions propounded by the trial judge the jury found that a conspiracy did exist, but that the medical staff was the only defendant that participated. *See supra* note 45 and accompanying text. Since the legal result of this finding is identical to that of our conclusion that the medical staff is a "combination," the district court's error was harmless.[50]

Finally, we deal with the plaintiffs assertion that the district court erred in charging the jury that the hospital could not conspire with its medical staff. The district court found that the medical staff was an unincorporated division of the hospital, and as such the court determined that the two could not conspire. Although we do not necessarily agree with the district court's characterization of the medical staff as an unincorporated division of the hospital, we agree with

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50. We also reject the defendants' argument that because the jury exonerated all defendants except the medical staff of conspiracy, and because there was no evidence of any other possible conspirator, the jury's section 1 verdict cannot stand. Because the medical staff itself is a combination within the meaning of section 1, no other co-conspirators are required for section 1 liability.

its basic conclusion that, with respect to the issues in this case, the hospital could not, as a matter of law, conspire with the medical staff. The medical staff was empowered to make staff privilege decisions on behalf of the hospital. As such, with regard to these decisions, the medical staff operated as an officer of a corporation would in relation to the corporation. Although the members of the medical staff had independent economic interests in competitition with each other, the staff as an entity had no interest in competition with the hospital. Accordingly, we conclude that the district court correctly charged the jury that there could not be a conspiracy between the hospital and the medical staff. *But see Antitrust and Hospital Privileges*, *supra* note 4, at 639-40.[51]

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51. In this article the authors examine the role of medical staff members in relation to the hospital and conclude that these physicians should be treated as "outside agents" of the hospital and thus capable of conspiring under the antitrust laws:

> Attending physicians, however, are independent contractors with the hospital for other legal purposes and most of them also provide ambulatory services that are outside the scope of their hospital roles. Such independent physician behavior suggests that the relationship between medical staff members and a hospital is more analogous to the relationship between a corporation and its "outside agents" -- lawyers, accountants, advertising firms, and consultants -- than to the relationship between a corporation and its salaried employees. Physicians thus may be treated as "outside agents" of the hospital, if not as independent enterpreneurs. Significantly, the precedents are clear that outside agents are separate enough from the corporations they do business with to be treated as co-conspirators under the Sherman Act. Moreover, in the case of physician cartel decisions, there is no independent interest of the hospital, and thus the intraenterprise conspiracy defense would seem to be

2. *Proof of Restraint of Trade*

a. *Introduction*

Read literally, Section 1 prohibits every agreement "in restraint of trade." In *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898), the Supreme Court recognized that Congress could not have intended a literal interpretation of the word "every," and since *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), courts have analyzed most restraints under the so-called "rule of reason." As its name suggests, the rule of reason requires the factfinder to decide whether, under all the circumstances of the case, the restrictive practice imposes an unreasonable restraint on competition.[52]

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entirely spurious. The physicians are not acting even arguably as agents, but rather as entirely independent actors who desire to use the hospital for their own anticompetitive purposes.

Id. (footnotes omitted). Some commentators have suggested the creation of a rebuttable presumption of agreement between the hospital and the medical staff. *See Antitrust and Hospital Privileges*, *supra* note 4, at 642; Note, *A Suggested Role for Rebuttable Presumptions in the Antitrust Restraint of Trade Litigation*, 1972 Duke L.J. 595, 605-624. These authors focus on the relationship between the hospital and the members of its medical staff. We focus instead on the relationship between the entities (individual doctors) who make up the medical staff, and conclude that it is they who provide the requisite joint action element for a section 1 violation.

52. Justice Brandeis provided the classic statement of the rule of reason in Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To

The courts have also, however, applied a rule of *per se* illegality to certain types of business practices. The development of *per se* rules has resulted from a recognition that the case-by-case approach inherent in the rule of reason has significant costs,[53] and that certain types of business practices almost always have anticompetitive effects without offsetting pro-competitive effects. In applying the *per se* rules, a court eschews the ordinary evaluation of the effect of the challenged practice, and concentrates instead on the question whether the practice falls within one of the categories of practices condemned by the *per se* rule. In this case, the plaintiffs argued that the actions of the

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determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied: its condition before and after the restraint was imposed: the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

53. These costs are a product of the detailed factual analysis necessary to evaluate the myriad of business practices challenged under the antitrust laws. Litigation of the effect or purpose of a practice often is extensive and complex. Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958). Judges often lack the necessary expert understanding of market structures and behavior to make accurate determinations about a practice's effect on competition. United States v. Topco Associates, Inc., 405 U.S. 596, 609-10 (1972). One result of the specific nature of a determination under the rule of reason is that prior adjudications may provide little certainty or guidance about the legality of a practice in another situation. *Id.* at 609 n.10; *Northern Pacific Ry. Co.*, 356 U.S. at 5.

defendants were the equivalent of a boycott, or as it is sometimes called, a concerted refusal to deal, and thus illegal *per se*.[54] We now turn to that inquiry.

b. *Is Defendants' Exclusionary Conduct the Equivalent of a Concerted Refusal to Deal ("Boycott")?*

The jury found that the defendants had engaged in a policy of discrimination against Dr. Weiss and the other D.O.s in the York MSA by applying unfair, unequal, and unreasonable procedures in reviewing their applications. *Weiss*, 548 F. Supp. at 1051 (findings of fact Nos. 5-8). In addition, the district court concluded that this unfair, unreasonable, and unequal treatment "could reasonably be anticipated [by the defendants] to cause osteopathic physicians to refrain from applying for staff privileges at the York Hospital." *Weiss*, 548 F. Supp. at 1053 (finding of fact No. 31).[55] The question before us is whether these actions should properly be characterized as a "group boycott" or "concerted refusal to deal,"[56] in which case

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54. "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." Northern Pacific Ry. Co. v. United States, 356 U.S. at 5 (citations omitted). *See* United States v. Columbia Steel Co., 334 U.S. 495, 522-23 (1948); Malley-Duff & Associates, Inc. v. Crown Life Ins. Co., 734 F.2d 133, 140 (3d Cir. 1984); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 (3d Cir. 1979).

55. These findings are clearly not "critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." Dawson v. Chrysler Corp., 630 F.2d 950, 959 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981)(quoting Denneny v. Siegel, 407 F.2d 433, 439 (3d Cir. 1969)), and therefore we affirm them.

55. We use these two terms interchangeably. Professor Sullivan has pointed out that each term has its advantages and disadvantages: "boycott" is cryptic and emotionally

they are illegal *per se* under section 1. *See United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914). If the defendants' actions cannot be so characterized, the rule of reason analysis would apply and the outcome of the case could be different. *But see infra* note 61. We conclude that the defendants' actions, as found in the district court, are the equivalent of a concerted refusal to deal.

The classic example of a concerted refusal to deal is the situation in which businesses at one level of production or distribution, e.g., retailers, use the threat of a boycott to induce businesses at another level, e.g., manufacturers, not to deal with competitors of the retailers. As Professor Sullivan has observed, "The boycotting group members, in effect, say to their suppliers or to their customers, 'If you don't stop dealing with non-group members, we will stop dealing with you.' If continued trade with group members is more important to a supplier or customer than is trading with non-group members, this threat will be effective." L. Sullivan, *Handbook of the Law of Antitrust* § 83, at 230 (1977).[57]

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charged, but "concerted refusal to deal" is imprecise and in some respects too narrow and in other respects too broad. *See* L. Sullivan, *Handbook of the Law of Antitrust* § 83, at 231 (1977).

57. If the businesses are controlled at both levels by the same firm, and the divisions at one level of production urge the parent corporation not to deal with their rivals, there is no "concerted refusal to deal" under section 1. *Copperweld*, 104 S. Ct. 2731 (1984); *supra* note 48. In this situation, the

In this case York is a provider of hospital services: for the purpose of our analysis, the equivalent of the manufacturer in the example of a classical boycott. Similarly, the M.D.s are the equivalent of the retailers in the example, in the sense that physicians require access to a hospital in order to effectively treat patients. The difficulty with this analogy, at first blush, is that there is no evidence that the M.D.s have used coercion for the purpose of inducing York to exclude their competitors, the D.O.s. Upon closer analysis, however, the absence of coercion is irrelevant. A boycott is not

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law assumes that the vertically integrated firm will choose to maximize the profits of the firm as a whole. If the firm can reap a larger profit by selling to or buying from both its subsidiaries on a particular level of production or distribution and their competitors, it will have no incentive to refrain from doing so. The subsidiaries are not in a position to "boycott" their parent; therefore, there can be no coercive behavior by subsidiaries to force a parent to make a decision that is not in the best interests of the company as a whole. As a result, the "concerted refusal to deal" doctrine does not apply in the context of a subsidiary attempting to influence a parent's behavior.

This case can be viewed as presenting the question whether the relationship between York Hospital and the M.D.s is like a parent-subsidiary relationship, or more closely akin to a traditional boycott. But the rationale for treating the parent-subsidiary relationship differently -- that the subsidiaries cannot pressure the parent to act against its own interests -- does not apply where independent economic entities such as the M.D.s on the medical staff control the staff-privileges decision-making of an entity -- York -- at another level of production. Therefore we conclude that this case does not involve a parent-subsidiary relationship. We note, in this regard, our cognizance of the fact that the staff-privileges decision of the medical staff is subject to ultimate review by the Hospital Board. However, given the dominant role of the medical staff and the limited nature of the review process in that area, *see supra* typescript at pp. 16-23, we believe that the jury's findings as to the culpability of the medical staff are supported

illegal under the antitrust laws because of opposition to the use of coercion, but because it involves the use by businesses of an existing relationship with a supplier to exclude competition. In the paradigm case, coercion is necessary to induce the supplier not to deal with the competitors. In this case, because of the M.D.'s control over York's admission decisions, no coercion is necessary. The underlying antitrust violation is the same: a group of firms at one level of distribution, i.e., the doctors' level, have used their existing relationship with a supplier to exclude their competitors from dealing with the supplier.[58]

We recognize that the facts of this case do not precisely fit into the mold of the classical refusal to deal. The refusal to deal is less than total insofar as York admitted Dr. Zittle and a number of other osteopaths. *See supra* note 13 and *infra* note 76. Arguably then, what is at issue is not a boycott but mere discrimination, which sounds less like a *per se* antitrust violation. However, given the evidence of the different standards applied to osteopaths and M.D.'s and the second class citizenship afforded D.O.'s upon

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58. We note that in this case York possesses monopoly power in the York MSA with respect to inpatient hospital health care services. *See infra* text accompanying notes 71-72. We therefore need not reach the question whether, in order to constitute a *per se* illegal boycott, a conspiracy to exclude a group of potential competitors from hospital staff privileges requires that the hospital -- i.e., the entity at the other level of "production" -- possess substantial market power in the relevant market. This distinguishing factor might render the analysis in this case different from the analysis in a large metropolitan area. *Cf.* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S.Ct. 1551, 1559 (1984)("According, we have condemned tying arrangements [only] when the seller has some special ability -- usually called 'market power' -- to force a purchaser to do something that he would not do in a competitive market.")

admission to staff privileges at York, and in view of the adverse impact of these factors upon D.O. applications for York staff privileges, we are satisfied that the restrictive policy is, in purpose and effect, sufficiently close to the traditional boycott, that the characterization is appropriate.

The Medical Staff is, however, entitled to exclude individual doctors, including osteopaths, on the basis of their lack of professional competence or unprofessional conduct. *See infra* note 60. If York's policy toward D.O.'s could be viewed as a form of industry self-regulation of this type, the rule of reason, rather than a *per se* rule, would be applicable. *See generally* L. Sullivan, *Handbook of the Law of Antitrust* §§ 86-88 (1977).[59] We recognize, therefore, that in many cases involving exclusion from staff privilege, courts will, more or less openly, have to utilize a rule of reason balancing approach. This case is different, however, because York has not contended that osteopaths as a group are less qualified than M.D.s. *See supra* note 4. In the absence of such a contention, or another legitimate explanation for the discrimination, we conclude that a *per se* rule should be applied, since the effect of the practice is identical to that of the traditional boycott, and plainly anticompetitive.

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59. As Professor Sullivan notes in his treatise, the initial question in "industry self-regulation" cases is whether the challenged restrictions have the "purpose and effect" of a classical boycott, and the scope of this initial analysis can be "so spacious that it matters little whether the inquiry is described as one aimed at determining whether a *per se* rule governs or as one in which the rule of reason is being applied, so that a judicial conclusion that 'this is a boycott and the *per se* rule governs' is very much the same as saying, 'considering everything this joint action is unreasonable.'" *Id.* § 88, at 248.

Congruent with the foregoing discussion, the Supreme Court has adopted an exception to application of the *per se* rule of illegality where the case involves a learned profession and where the restriction is justified on "public service or ethical norm" grounds. Thus unlike most cases where characterization of some activity as a classical boycott ends the inquiry, here, because the medical profession is involved, the rule of reason analysis may still control, as a "built-in" exception. We now turn to a discussion of this potential "escape hatch" to see if it can extricate the defendants from the "cut" of the *per se* rule.

c. *The "Learned Profession" Exception*

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975), in which the Supreme Court made clear that the medical profession is not exempt from the antitrust laws, the Court stated that the "public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *See also National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978). In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348-49 (1982), the Court partially explained this exception by stating that conduct which is normally subject to *per se* condemnation under section 1 will instead be subject to rule of reason analysis where the challenged conduct is "premised on public service or ethical norms." *Id.*[60] In *Maricopa*, because the

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60. In the *Professional Engineers* case, the Supreme Court stated:

> We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and,

> accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society's argument in this case is a far cry from such a position. We are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. Certainly, the problem of professional deception is a proper subject of an ethical canon. But, once again, the equation of competition with deception, like the similar equation with safety hazards, is simply too broad: we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.

435 U.S. at 696 (footnote omitted). In the light of the Supreme Court's subsequent decision in *Maricopa County*, *see* text, we read *Professional Engineers* to hold that where an "ethical norm" of a learned profession is under attack on section 1 grounds, a rule of reason analysis governs even if the *per se* rule might otherwise apply, but that in order to prevail on the rule of reason inquiry the defendant must demonstrate that the challenged conduct has a pro-competitive effect. *Cf. Antitrust and Hospital Privileges*, *supra* note 4, at 644-45 n. 239 (commentators differ on whether *Professional Engineers* applied the rule of reason or the *per se* approach).

We add that the defendants adduced certain evidence that tended to show that Dr. Weiss was boisterous and discourteous to nurses in areas of the hospital where patients might have overheard and have been disturbed. *See supra* note 18. Although this evidence was not the central focus of the trial -- the major issue was whether the defendants applied two levels of scrutiny to applicants: a very deferential review to M.D. applicants and a substantially more rigorous review of osteopathic applicants -- we do not doubt that a hospital could exclude an applicant from staff privileges either because he is not medically qualified or because of unprofessional conduct, so long as the hospital applies the same standards to all applicants. This result does not skew our antitrust

defendants did not attempt to justify their price fixing arrangements on either of these grounds, but instead attempted to argue that the maximum price levels were pro-competitive, the Court held that the *per se* rule controlled and consequently found that the defendants' conduct violated section 1.

In this case the defendants have offered no "public service or ethical norm" rationale for their discriminatory treatment of D.O.s. Indeed, their defense at trial was that they did not discriminate against D.O.s. Since the jury believed otherwise, we

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analysis. First, as to medical ability, restricting staff privileges to doctors who have achieved a specified level of medical ability falls within the scope of a hospital's "public service" function, and therefore the rule of reason analysis, not the *per se* rule of illegality, would control. Applying the rule of reason analysis, it seems obvious that by restricting staff privileges to doctors who have achieved a predetermined level of medical competence, a hospital will enhance its reputation and the quality of the medical care that it delivers. Thus such action is pro-competitive and, therefore, permissible under the rule of reason. *See infra* note 61. The analysis for professional conduct is basically identical. The "public service" function of a hospital is to provide for effective and efficient medical treatment for its patients. One factor in the effective and efficient running of a hospital is a medical staff that can work together and be courteous to patients and staff. Doctors who have a history of trouble in interpersonal relations can legitimately be excluded because, if admitted, they will reduce the effectiveness of the medical staff, thereby reducing the ability of the hospital to provide top-flight service. In sum, doctors who have trouble getting along with other people will reduce efficiency, thereby reducing the hospital's competitive position, and, therefore, exclusion of such doctors is pro-competitive and permissible under the rule of reason.

See generally Dolan & Ralston, *supra* note 4, at 719, 735.

conclude that the *per se* rule governs this case,[61] except to the extent that the defendants may defend as to the damage claims of Weiss or any class member on grounds of lack of professional capacity or unprofessional conduct.

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61. Several circuit court opinions have held the rule of reason analysis, not the per se rule of illegality, controls in boycott cases involving the learned professions. We believe these cases are readily distinguishable from the instant case. In Wilk v. American Medical Ass'n., 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 2399 (1984), a case involving the refusal of M.D.s to deal with chiropractors, the Seventh Circuit stated: "boycotts are illegal *per se* only if used to enforce agreements that are themselves illegal *per se* -- for example price fixing agreements." *Id.* at 221 (quoting Marrese v. American Academy of Orthopedic Surgeons, 706 F.2d 1488, 1495 (7th Cir. 1983), *on rehearing*, 726 F.2d 1150 (7th Cir.), *cert. granted*, 104 S.Ct. 3553 (1984)). Since the court could find no *per se* illegal purpose for the A.M.A.'s medical ethics principle 3, which in essence provided that M.D.'s should not associate with chiropractors, it concluded that the rule of reason analysis governed in that case. We believe that the Seventh Circuit was correct in utilizing a rule of reasons analysis in the *Wilk* case because the defendants were plainly asserting a "public service or ethical norm" justification for their concerted refusal to deal with chiropractors. In Virginia Academy of Clinical Psychologists v. Blue Shield of Va., 624 F.2d 476, 484-85 (4th Cir. 1980), the Fourth Circuit stated: "Because of the special considerations involved in the delivery of health services, we are not prepared to apply a *per se* rule of illegality to medical plans which refuse or condition payments to competing or potentially competing providers." First, we note that the Fourth Circuit did not have the benefit of the Supreme Court's opinion in *Maricopa* when it decided *Virginia Academy*, and indeed the court cited the Ninth Circuit's opinion in *Maricopa*, which was subsequently reversed by the Supreme Court, as support for its decision that the rule of reason governed. Second, a "medical necessity" justification was apparently raised by the defendants, and in our view that would have been sufficient to bring the defendants within the purview of *Maricopa*'s exception for conduct based on "public

d. *The District Court's Charge and the Sherman Act Section 1 Verdict as to Weiss*

As we have explained, the case was submitted to the jury on special interrogatories, and, based thereon, the district court made certain findings based theron and granted injunctive relief. Because of our rulings on appealability, *see supra* Part III B, we ultimately review

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service or ethical norms."

Finally, in Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984), the D.C. Circuit Court held that the rule of reason analysis governed a section 1 challenge to a rule promulgated by the American Academy of Periodontology (AAP) that limited membership in the AAP to licensed dentists who practice periodontics exclusively, and who do not practice other forms of dentistry. The court labeled the effect of the AAP's rule a "group boycott" but concluded that "[w]hen a conspiracy of this sort is alleged in the context of one of the learned professions, the nature and extent of its anticompetitive effect are often too uncertain to be amendable to *per se* treatment." *Id.* at 1492. We believe the "boycott" involved in the *Kreuzer* case is not a classical boycott, in that a group of conpetitors at one level of production -- i.e., the periodontists -- were not trying to use their position to coerce some entity on some other level of production to discriminate against competitors of the periodontists, and therefore *Kreuzer* is inapposite to the facts of the instant case.

Even if we were to conclude that a rule of reasons analysis governs in this case simply because a learned profession is involved, we would conclude that the defendants' conduct here was an unreasonable restraint because: (1) Weiss met his burden of production and persuasion that the purpose and effect of the defendants' discriminatory conduct was to "foreclose so much of the market from penetration by [the M.D.s'] competitors [i.e., the D.O.s] as to unreasonably restrain competition in the affected market, the market for [inpatient medical care]," *see* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1568 n.51 (1984), and (2) the defendants -- who relied solely on the defense they had not discriminated against D.O.s -- made no attempt to counter this evidence.

here. in terms of the plaintiffs' section 1 claims. only the injunctive order. We conclude that a *per se* analysis. coupled with the district court's findings. provide the substantive basis for the issuance of an injunction under section 1 of the Sherman Act in favor of the class and that. as a matter of law. there is no grounds for distinguishing Weiss and the class under section 1 *for purposes of injunctive relief*. The district court entered an injunction in favor of both Weiss and the class. but held that Weiss was entitled to relief under section two. Although we reverse that holding. *see infra* part IV.B.. we conclude that Weiss was entitled to injunctive relief under section 1.

The question of whether Weiss or any class member is entitled to damages. however. is in no way settled by our conclusion. In the trial on the question of damages. the defendants may raise the defenses relating to individual osteopaths. including the demand the demand requirement defense as to members of the class. *see supra* notes 30. 32. and the defense of lack of professional competence or character as to both Weiss and the class. This is so even though. as we have explained. no such defense has been interposed as to osteopaths generally. thus facilitating our disposition of the injunctive relief claim under section 16. *See supra* at Part III C 1.

We must also address the question whether the professional competence and character issue has already been resolved by the jury's verdict with regard to Weiss. This requires a consideration of the relevant portion of the district court's charge. The court charged that a combination rule-of-reason *per-se* analysis applied to defendants' conduct:

> Among the practices which the courts have deemed to be unlawful in and of themselves --

that is the *per se* quality -- are group boycotts or concerted refusals to deal.

In this case it is alleged that the York Hospital and members of its Medical Staff have conspired to exclude osteopathic physicians from the staff of the hospital or obtaining access to the staff. This would be a refusal to deal, *per se* and unreasonable restraint of trade.

If you find that the Defendants while acting in concert acted to exclude osteopathic physicians from the medical staff of York Hospital or treated osteopathic physicians in a way different from allopathic physicians, or acted unreasonably with the purpose or effect of excluding osteopathic physicians from the staff of York Hospital, I then instruct you that such conduct would be an unreasonable restraint of trade as a matter of law.

. . . .

In determining whether or not a *per se* unreasonable conspiracy existed among any of the defendants as co-conspirators to refuse to deal with the Plaintiff Weiss, or the Plaintiff class, you may consider the validity of the reasons which such parties have given for any refusal to deal with the Plaintiff or the Plaintiff class.

. . . .

Even if you do not find the defendants' behavior to be *per se* an unreasonable restraint of trade, you may still find that under all the circumstances the defendants' conduct was an unreasonable restraint of trade.

App. at 5690a-5695a. Apparently applying this instruction, the jury concluded that the defendants' conduct constituted an "unreasonable restraint" as to the class, but was not an "unreasonable restraint" as to Weiss. *Weiss*, 548 F. Supp. at 1051-52 (findings of fact Nos. 7 & 9). Based on these answers, the district court concluded that the medical staff was liable for violating Sherman Act section 1 as to the class but not as to Weiss.

This conclusion is flawed, however, because the instruction was either incorrect or misleading. The instruction was incorrect to the extent that the defendants' conduct in discriminating against D.O.s as a class is subject to the *per se* rule of illegality, hence it was irrelevant whether the defendants' conduct was an unreasonable restraint as to Weiss (or the class). In that respect the question should not have been submitted to the jury. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S.Ct. 1551, 1556 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977). To the extent that the charge posed to the jury the question whether it was not unreasonable to deny Weiss admission because he lacked professional competence or character, it was confusing, because the court did not properly define the relationship between the *per se* rule for concerted refusals to deal and the learned profession exception. The question of Weiss' professional competence or character, however, was neither properly nor squarely presented to the jury. The district court did not reach any conclusion arguably based on that question.[62]

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62. After the jury returned its answers, Weiss moved for judgment in his favor on the section 1 count,

Because of the confusion in the court's charge, and the lack of a specific special interrogatory to the jury, we cannot deem the issue of Weiss' professional competence and character as a defense to his claim for damages concluded. Hence, to the extent that the question was arguably resolved by the jury, we grant a partial new trial on that issue. In all other respects Weiss is entitled to the benefit of the district court's findings under section 1.

3. *Substantiality of Effect on Interstate Commerce*

In order to violate section 1 of the Sherman Act, a defendant's actions must relate to trade or commerce "among the several States."[63] There are two ways to

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notwithstanding the jury's determination that the defendants' conduct did not constitute an unreasonable restraint as to him, on the grounds that the *per se* rule of illegality should have been applied to defendants' conduct. *Weiss*, 548 F. Supp. at 1054. In response, the district court stated:

> Since Plaintiff Weiss has otherwise established liability of the York Hospital and the York Hospital Medical and Dental Staff to him under the antitrust laws, the Court need not decide at this time whether the conspiracy to deny Plaintiff Weiss staff privileges at the York hospital is in violation of the Sherman Act.

Id. The court did not include in its order any specific declaration that Weiss did not prevail as to section 1.

63. This interstate impact requirement has been construed as an element of both jurisdiction and the substantive offense under the Sherman Act. *See* Mortensen v. First Federal

satisfy this requirement: the proscribed conduct may itself be "in interstate commerce," or the conduct may be a purely intrastate activity that has a "substantial and adverse effect" on interstate commerce.[64] *See, e.g., McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980); *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976); *Cardio-Medical Associates, v. Crozer-Chester Medical Center*, 721 F.2d 68, 71 (3d Cir. 1983).

The district court focused its evidentiary inquiry on the effect on interstate commerce of *the defendants'* conduct and found the requisite "substantial and adverse" effect.[65] Both before the district court and on

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Savings & Loan Ass'n, 549 F.2d 884, 890-91 (3d Cir. 1977). The inquiry is the same for both elements. Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976); Englert v. City of McKeesport, 736 F.2d 96 (3d Cir. 1984).

64. Another formulation of the test, which apparently has the same meaning, is that the conduct must have a "not insubstantial effect" on interstate commerce.

65. At trial the plaintiff presented evidence demonstrating that York's business activities had a substantial effect on interstate commerce. York's gross patient revenue for an average year was approximately 50 million dollars. App. at 493a. The testimony indicated that York made substantial purchases of drugs and equipment in interstate commerce. App. at 4505a. In addition York routinely treated out-of-state patients and billed them at their out-of-state residences. App. at 4473a-4475a. Finally, the overwhelming majority of patient bills were paid by third party payors (i.e., private insurance companies and federal and state insurers) many of whom are located outside Pennsylvania. App. at 4473a-4475a. Based on this evidence, the jury found that: "(1) the Defendants engaged in business activities in interstate commerce. Special Verdict No. 1; (2) Defendants' conduct concerning Plaintiff Weiss and the

appeal the defendants have contended that the proper focus should have been whether the defendants' allegedly illegal conduct substantially affected *the plaintiffs'* activities in interstate commerce. The defendants concede that, if the district court was correct in focusing the inquiry on the effect of the defendants' activities, the evidence supports the jury's and court's conclusion that the effect on interstate commerce was "substantial and adverse."

The defendants' argument is premised primarily on a district court opinion, *Cardio-Medical Association. v. Crozer-Chester Medical Center*, 552 F. Supp. 1170 (E.D. Pa. 1982). Since the time of oral argument in this case, however, this court reversed that district court's opinion and held that:

> We therefore decline to adopt the district court's theory that defendants' conduct is relevant to the jurisdictional inquiry only insofar as it affects interstate commerce through the person of the plaintiff . . . . [W]e are willing to examine the defendants' conduct both as it affects interstate commerce through the person of the plaintiff and as it affects commerce independently.

Cardio-Medical Assocs. Ltd. v. Crozer-Chester Med. Ctr., 721 F.2d 68, 75 (3d Cir. 1983). Consequently, the district court was correct in focusing on the effect on

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Plaintiff class occurred in interstate commerce. Special Verdict No. 2; (3) the Defendants' conduct had a 'not insubstantial effect' on interstate commerce. Special Verdict No. 3; and (4) the Defendants' conduct concerning Plaintiff Weiss and the Plaintiff class had a 'not insubstantial effect' on interstate commerce. Special Verdict No. 4." *Weiss*, 548 F. Supp. at 1051 (findings of fact Nos. 1-4).

interstate commerce of the defendants' activities.[66] We therefore we affirm the finding of a "substantial and adverse" impact on interstate commerce in this case.

B. *Section 2 of the Sherman Act*

Section 2 reads in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . . .

15 U.S.C. § 2. The test for determining whether a defendant has monopolized in violation of section 2 has been articulated by the Supreme Court as: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). *See also Borough of Lansdale v. Philadelphia Electric Co.*, 692 F.2d 307, 311 (3d Cir. 1982).[67] The district court found the defendant York liable to both Weiss and the

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66. Most of the evidence on interstate impact concerned York Hospital's activities in interstate commerce, however, only the medical staff was found liable under section 1. We conclude that this discrepancy is irrelevant because the medical staff does not exist independent of the hospital, and therefore the hospital's activities in interstate commerce are attributable to the medical staff also.

67. Section 2, like section 1, also contains the requirement that there be a substantial effect on interstate commerce; that requirement has been met in this case. *See supra* text accompanying notes 63-66.

plaintiff class for unlawful monopolization in violation of section 2. York has appealed that finding.

York contends that the jury incorrectly concluded that the appropriate market was inpatient health care services provided by hospitals and their staffs; that it incorrectly concluded that York had monopoly power in that market; and that it incorrectly concluded that York acquired or maintained that power by means of "willful" conduct. We conclude that, although there was sufficient evidence to support the jury's conclusion as to relevant market and monopoly power, there was no evidence of willful conduct designed to acquire or maintain monopoly power, and therefore the judgment against York under section 2 must be reversed.

(1) *Relevant Market*

In order to define the relevant market for purposes of a section 2 claim, it is necessary to examine two aspects of that market: the product market and geographic market. York does not challenge the jury's finding that the relevant geographic market is the York MSA. York does, however, challenge the jury's finding on the product market. In answer to special verdict question number 14, the jury found that the relevant product market was "inpatient hospital health care services supplied by hospitals and their medical staffs." *Weiss*, 548 F. Supp. at 1052 (finding of fact No. 10). Market definition is a question of fact, *Borough of Lansdale*, 692 F.2d at 311-12, and we therefore must affirm the jury's conclusion unless the record is devoid of evidence upon which the jury might reasonably base its conclusion. *See Dawson v. Chrysler Corp.*, 630 F.2d 950, 959 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 28 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969).

Recognizing their substantial burden in overturning a jury's factual finding, York argues that, as a matter of law, the product market is the narrowest market that includes all competing products that consumers perceive as reasonable substitutes for each other.[68] Defendants' Brief at 40. York contends that, since the plaintiff's expert did not support his conclusion that the relevant market was inpatient hospital care with "any study or evidence of any kind that patients perceive all health care to be essentially fungible," and since it is obvious that inpatient hospital services are not fungible, the jury's finding that the relevant product market is inpatient health care is incorrect as a matter of law. *Id.* at 41.

In defining a market in an antitrust case, the fact finder must take into account the realities of competition. *See United States v. Grinnell Corp.*, 384 U.S. 563, 572-73 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 321, 356-57 (1963); *see also Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). Since the purpose of market definition is to determine whether market power exists, *see* L. Sullivan, *Handbook of the Law of Antitrust* § 12 (1977), market definitions must account for all factors affecting the ability of the alleged monopolist to raise prices or restrict competition, but need not account for other factors which might affect an economist's definition of a product market.

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68. In the typical antitrust action the defendant attempts to prove the widest (and the plaintiff the narrowest) possible market. This is true because the fraction of the relevant market controlled by the defendant will usually be the most important indicator of monopoly power. Thus the larger the product market is, the larger the denominator of the equation will be, thereby decreasing the percentage of the defendant's market power and consequently the probability of establishing an offense. *See* Dolan & Ralston, *supra* note 4, at 763-764.

Defendants argue that "inpatient health care services" is not a single market, but an amalgam of numerous markets for individual types of services. Where, however, several goods or services are generally offered by the same providers, it is not unreasonable for a jury to conclude that the market for antitrust purposes includes all of those goods or services. *See Grinnell Corp.*, 384 U.S. at 572;[69] *Philadelphia National Bank*, 374 U.S. at 363. In this case, the medical staffs. App. at 3851a. The defendants' expert also testified that a patient may require several different types of services during his stay at a hospital depending on the course of his treatment. App. at 5136a-37a. The jury could reasonably have concluded based on this testimony that a consumer of hospital services makes one "purchase decision" -- where to be hospitalized -- and that further decisions concerning his treatment are relatively insulated from any

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69. In *Grinnell Corp.*, which involved "central station protection" against losses such as burglary, fire, water overflow, and the like, the defendants there made essentially the same argument as that made by defendants here:

> Defendants argue that the different central station services offered are so diverse that they cannot . . . be lumped together to make up the relevant market. For example, burglar alarm services are not interchangeable with fire alarm services.

384 U.S. at 571-72. The Supreme Court squarely rejected that argument, upholding a single service market for central alarm protection:

> But there is here a single use, i.e., the protection of property through a central station that receives signals. . . . We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities.

Id. at 572.

competitive effect.[70] This conclusion was clearly supported by the evidence, and therefore we affirm the jury's finding that the relevant product market was inpatient hospital health care. *See Grinnell Corp.*, 384 U.S. 563 (1966).

(2) *Monopoly Power.*

Monopoly power is defined as the ability to control price in or to exclude or restrict competition from a relevant geographic market. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 26 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).[71] In their answers to special verdict questions numbers 16 and 18, the jury expressly determined that York had such power. On appeal York asserts that there was insufficient evidence to support the jury's conclusion on this point. We find this contention to be without merit.

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70. On this point the district court charged the jury:

> To repeat, in this case the Plaintiffs claim that the relevant product market is that of inpatient hospital health care supplied by hospitals and their medical staffs. You must determine whether Plaintiff has carried his burden of proof that this alleged market in fact exists and is the narrowest relevant product market.

App. at 5702a.

71. This is precisely how the concept was defined to the jury in the district court's charge:

> Monopoly power is defined as the power to control prices or exclude competition in a relevant market. Therefore you must determine whether the Defendants could either control prices or exclude competition in the relevant product market.

App. at 5702a.

A primary criterion used to assess the existence of monopoly power is the defendant's market share. *See* L. Sullivan, *Handbook of the Law of Antitrust* § 22 (1977).[72] In this case, the plaintiffs' expert testified that York possessed a market share in excess of eighty percent, and that in his expert opinion the defendants possessed "the power to exclude competition" and "the

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72. The general rule was stated by the Supreme Court in *Grinnell Corp.*:

> In United States v. E.I. du Pont de Nemours & Co., . . . we defined monopoly power as "the power to control prices or exclude competition." The existence of such power ordinarily may be inferred from the predominant share of the market. In American Tobacco Co. v. United States, . . . we said that . . . "over two-thirds of the entire domestic field of cigarettes, and * * * over 80% of the field of comparable cigarettes" constituted "a substantial monopoly." In United States v. Aluminum Co. of America, . . . 90% of the market constituted monopoly power. In the present case, 87% of the accredited central station service business leaves no doubt that the congeries of these defendants have monopoly power . . . .

384 U.S. at 571. *See also* International Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242, 249 (1959) (81% market control is sufficient to establish monopoly power); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 389-90 (1956); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 33 (1911) (90% is enough); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (90% is enough, 60% not likely enough, and 33% not enough). The courts consider more than just the percentage of the market share in determining monopoly power. Other relevant factors that the courts have identified include: the size and strength of competing firms, freedom of entry into the field, pricing trends and practices in the industry, ability of consumers to substitute comparable goods on services from outside the market, and consumer demand factors. A defendant's power either by itself or aided by these other factors must be enough to restrict entry, supply, or price. *See* L. Sullivan, *Handbook of the Law of Antitrust* §§ 22-32 (1977); *see also* Dolan & Ralston, *supra* note 4, at 767.

power to raise and control prices." App. at 3861a. Since monopoly power is a question of fact. *Borough of Lansdale v. Philadelphia Electric Co.*. 692 F.2d 307. 311 (3d Cir. 1982). and since we believe that the expert's testimony and York's market share is sufficient evidence upon which the jury could reasonably have concluded that monopoly power existed in this case. we affirm the jury's and district court's finding on this point. *See Dawson v. Chrysler Corp.*. 630 F.2d 950. 959 (3d Cir. 1980). *cert. denied.* 450 U.S. 959 (1981).

3. *Willful Acquisition or Maintenance of Monopoly Power*

In addition to proving monopoly power in the relevant market. an antitrust plaintiff must also show that the defendant willfully acquired or maintained that power. *United States v. Grinnell Corp.*. 384 U.S. 563. 570 (1966); *Borough of Lansdale v. Philadelphia Electric Co.*. 692 F.2d 307. 311 (3d Cir. 1982). The plaintiffs concede that York lawfully acquired its monopoly power: therefore. the relevant issue is whether the plaintiffs adduced sufficient evidence to demonstrate that York "willfully" *maintained* this power. The only evidence that plaintiffs offered on this point was the testimony of their expert that M.D.s have a strong economic interest in excluding in excluding D.O.s from access to York Hospital because. if D.O.s are given access to York on the same terms and

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73. This requirement represents a policy judgment that a firm that has acquired and maintained its position as a monopolist because of "growth or development as a result of superior product. business acumen. or historic accident." *id.*. and not through anticompetitive conduct. should not be liable under the antitrust laws for its success.

conditions as M.D.s. M.D.s will be forced to compete directly and on equal terms with D.O.s. This testimony is a sufficient basis on which to imply an anticompetitive purpose on the part of the M.D.s in excluding the D.O.s. but it does not explain an economic motive on the part of the hospital to discriminate against D.O.s.

On this point. the uncontradicted evidence of both the plaintiffs' and the defendants' experts was that York. like any hospital. would maximize its revenues by giving staff privileges to every qualified doctor who applied. Hospitals are in the business of providing facilities (rooms and equipment) and support staff (nurses. administrators. etc.). These resources are fixed in the short run. and the hospital maximizes its revenues by encouraging competition for its hospital beds and operating rooms. Since only physicians with staff privileges can admit and treat patients. York can maximize competition for its facilities by granting staff privileges to every qualified doctor who applies. Excluding D.O.s. on the other hand. is likely to weaken York's monopoly position in the long run. since a potential rival. such as Memorial Hospital. would have an incentive to provide competing services for the D.O.s excluded from York.

Recognizing this problem with their section 2 claim. plaintiffs assert that. although the hospital itself has no economic reason to discriminate against D.O.s. the hospital's medical staff. which as a matter of law is a single entity with the hospital. *see supra* text preceding note 51. is a combination of M.D.s. each of whom have a strong economic motive to exclude D.O.s. Thus. the plaintiffs argue. we should ascribe the anticompetitive motives of the individual M.D.s to the hospital.

There are two problems with this argument. First, the fact that the individual M.D.s who make up the medical staff have parallel anticompetitive motives was the reason we concluded that, as a matter of law, the medical staff is a combination of doctors within the meaning of section 1. We believe, however, that it would be improper to attribute the economic motive of the M.D.s to York because the M.D.'s motive is to restrict competition in a market in which York is not involved, and because in fact York's economic interest is directly contradictory to that of the individual doctors. Second, even if the anticompetitive motive of the individual doctors could be attributed to the hospital, the actions taken in furtherance of that motive have nothing to do with the maintenance of York's monopoly position: restricting the access of D.O.s to York will not aid York in maintaining that monopoly power.

In sum, we conclude that there is no evidence that York "willfully" maintained its monopoly position as the dominant provider of inpatient health care services in the York MSA. For this reason we reverse the district court's finding that York violated section 2 of the Sherman Act.

C. *The Propriety and Scope of the Injunction under Section 16 of the Clayton Act*

The final issue we must confront is the propriety and scope of the injunction granted by the district court. The defendants challenge both the propriety of injunctive relief in this case, and the scope of the injunction issued. We conclude that the issuance of an injunction was within the discretion of the district court, but that, given the fact that we have modified the district court's conclusions concerning liability of the defendants under sections 1 and 2, the district court should reexamine the scope of that injunction.

Section 16 of the Clayton Act.[74] which authorizes injunctive relief in private antitrust cases, focuses on "threatened loss or damage" resulting from a violation of the antitrust laws, and it authorizes an injunction when and under the same conditions as injunctions are granted by "courts of equity." *See Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 589-94 (3d Cir. 1979); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975). Mindful of the language and purpose of section 16, courts have held that, in order to be entitled to injunctive relief, plaintiffs in an antitrust suit "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Mid-West Paper*, 596 F.2d at 591.

The jury found that both Weiss and the class had been injured by discriminatory admission practices at York.[75] and the district court adopted both of these findings. *Weiss*, 548 F. Supp. at 1051-52 (findings of fact Nos. 5 & 9). In addition, the district court expressly concluded that "absent an injunction, there is no guarantee that the injuries by the York Hospital and the York Hospital Medical and Dental Staff will abate." *Weiss*, 548 F. Supp. at 1058. Thus the district court concluded that there was a significant threat of injury from a continuing violation of the antitrust laws. *Id.* (citing *Mid-West Paper*, 596 F.2d at 594 n.85).

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74. The text of section 16 is set forth *supra* text following note 31.

75. As to Weiss, the jury concluded that "but for the fact that he was an osteopathic physician rather than an allopathic (M.D.) physician" he would have been granted staff privileges at York. Special Verdict No. 5. As to the plaintiff class, the jury concluded that the defendants' discriminatory actions "cause[d] injury to members of the Plaintiff class other than the Plaintiff in their business and property." Special Verdict No. 12.

The defendants suggest two reasons for their contention that the jury's findings that Weiss and the class were injured by the defendants' conduct are unsupported by any evidence in the record of this case. First, they claim that there is no evidence on which the jury could have based its conclusion that the medical staff discriminated against D.O.s. and therefore, if the staff did not discriminate against D.O.s, then the D.O.s could not have been injured by the staff. We have already concluded, however, that there was substantial evidence supporting the jury's conclusion of discrimination, and therefore we reject the defendants' contrary contention. Second, defendants suggest that primary care physicians, such as Weiss and the majority of the D.O. class members, do not need hospital admitting and attending privileges because they can provide their services solely by "visiting" their patients at York, and that therefore the plaintiffs were not injured by the alleged discriminatory conduct in denying them staff privileges.[76] We agree with plaintiff that:

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76. During the pendency of this class litigation, six out of the ninety-two class members applied and were accepted for staff privileges at York. Defendants contend that the admission of these six osteopaths, combined with the fact that Weiss is the only osteopath to ever be turned down for staff privileges at York, eliminated any threat of harm resulting from defendants' exclusionary conduct. The district court considered this contention and concluded that members of the plaintiff class nevertheless continued to be dissuaded from applying for staff privileges at York because of York's continued dual-track admissions policy. The court went on to find that the class' collective fear that they would not be treated equally with M.D. applications was reasonable, despite the recent trend to admit osteopathic applicants, because denial of staff privileges is a significant adverse professional event for a physician. This conclusion is not clearly erroneous. *Cf.* Zenith Radio Corp.

> This suggestion is preposterous . . . . [A] primary care physician will frequently need to admit his patients to the hospital and participate in their hospital care. (5262a - 5265a) As the physician with greatest familiarity with a patient, he is often the best one to coordinate the varied consultations, diagnostic services and therapeutic applications necessary to track down and treat disease. (*Id.*; 5903a; 3553a; 3572a) Often, he will have primary responsibility for the hospital management of a primary disease with a specialist having the responsibility for treatment of complications. *Id.* Like the specialist, if a primary care physician is foreclosed from privileges at York Hospital, he loses the ability to admit and treat patients there and the patient income which would otherwise be attributable thereto.

Plaintiffs' Brief at 57 n.25.

Because the district court's conclusion that Weiss and the class were threatened with significant injury due to the discriminatory treatment of D.O.s at York is supported by the evidence, we conclude that the court did not abuse its discretion in granting injunctive relief pursuant to section 16.

The injunction issued by the district court in this case was tailored to prevent possible future harm to Weiss and the class resulting from further discriminatory practices at York:

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v. Hazeltine Research, Inc., 395 U.S. 100, 131-32 (1969) ("Neither the relative quiescence of the [conspiracy] during litigation nor claims that objectionable conduct would cease with the judgment negated the threat to [plaintiff's] foreign trade. That threat was too clear for argument, and injunctive relief against [defendant] . . . was wholly proper.").

Pursuant to the Court's authority under 15 U.S.C. § 26, this Court hereby declares that the following equitable relief shall be entered against Defendants York Hospital and York Hospital Medical and Dental Staff:

1.1. The York Hospital and the York Hospital Medical and Dental Staff are restrained and enjoined from undertaking any overt act against either Plaintiff Weiss or members of the Plaintiff Class which would in any way impede or deny the Plaintiffs full, reasonable, fair, or equal access to the facilities of York Hospital and full, reasonable, fair or equal access to staff privileges at the York Hospital.

1.2 The York Hospital and the York Hospital Medical and Dental Staff are restrained and enjoined from applying standards of review to applications by osteopathic physicians for staff privileges at the York Hospital different from the standards of review applicable to similar applications of allopathic physicians.

1.3 The York Hospital and the York Hospital Medical and Dental staff are restrained and enjoined from interpreting the expression "American Board of Medical Specialty" as used in the York Hospital Medical Staff By-Laws to exclude osteopathic boards of medical specialty.

Weiss, 548 F. Supp. at 1061. Our scope of review over questions of the scope of an injunction issued pursuant to section 16 is abuse of discretion. *William Goldman Theatres, Inc. v. Loew's, Inc.*, 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948), and it appears that the injunction entered in this case falls within allowable discretion. However, given the fact that we have modified the district court's conclusions concerning the liability of the defendants under

sections 1 and 2, we believe that the prudent course is to remand to the district court to reconsider the proper scope of injunctive relief given our decision on the sections 1 and 2 claims. Accordingly, we remand the question to the district court so that it may consider whether or not the injunction should be modified. We do, however, note our concern that certain phraseology within the order might be subject to overbroad interpretation ("full . . . access . . . to the facilities"), though we leave that matter to the district court as well.[77]

IV. *CONCLUSION*

In summary, we reach the following conclusions. First, we find that the district court's decision that the medical staff violated Sherman Act section 1 as to the plaintiff class is supported by sufficient evidence, and we therefore will affirm the district court on this point. Since we also conclude that, as a matter of law, there was no distinction between Weiss and the class for purposes of injunctive relief under section 1, we hold that Weiss was entitled to the same relief as the class on that claim. Second, since there was no evidence adduced at trial that York engaged in any willful conduct designed to acquire or maintain its monopoly power, we will reverse the district court's finding of liability in favor of Weiss and the class and against York on section 2 grounds. Third, we also agree that the issuance of an injunction by the district court in this case was proper. Although the scope of the injunction

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77. We emphasize that we have not mandated that the district court should order York to admit Dr. Weiss. The plaintiffs requested this injunctive relief and the district court refused. The district court's injunction is tailored to require that the defendants treat M.D.s and D.O.s equally. Since the defendants have publicly maintained that they do treat M.D.s and D.O.s the same, the district court's injunction hardly seems burdensome.

also appears to fall within the district court's discretion, given our modification of the district court's determinations on the liability of the defendants under Sherman Act sections 1 and 2, we will remand the case to the district court for reconsideration of the scope of the injunction in light of our opinion here.

On remand, the court will also have to try the damage claims, affording the defendants the opportunity to raise the defenses that members of the class did not make demand for staff privileges, and that any such application, including that of Weiss, was properly refused because of the doctor's lack of professional competence or character. *See supra* note 18. To the extent that the district court may have addressed the latter question with respect to Weiss in its findings and judgment, we grant a partial new trial. Finally, although we did not address the question in the text, we have concluded, *see supra* note 29, that the district court's decisions absolving various of the defendants on various of the claims, which decisions are based on the jury's answers to the special verdict questions, are supported by the evidence, and we therefore will affirm them.[78]

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78. Defendants have requested that on remand the matter be reassigned to a different judge. We see no basis for so exercising our supervisory powers.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Malcolm WEISS, Plaintiff,

v.

YORK HOSPITAL, et al., Defendants.

Civil Action No. 80-0134.

United States District Court,
Middle District of Pennsylvania.

Sept. 30, 1982.

Arnold Levin, Michael D. Fishbein, Philadelphia, Pa., Lewis H. Markowitz, Marc G. Tarlow, York, Pa., for plaintiff.

Stuart H. Savett, David H. Weinstein, Philadelphia, Pa., Robert J. Brown, York, Pa., for defendants.

OPINION

MUIR, *District Judge*.

I. Introduction.

Plaintiff Malcolm Weiss, individually and on behalf of the class of all osteopathic physicians practicing in the York Medical Service Area filed this action for injunctive relief and monetary damages under the federal antitrust laws, 15 U.S.C. §§ 1, 2, 15, 26, as well as under state law on February 6, 1980. An amended complaint was filed on June 2, 1982 in which Weiss named as Defendants the York Hospital, the York Hospital Medical and Dental Staff, and individual defendants Gary Ardison, M.D., Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., Jack A. Kline, M.D., Lois Kushner, M.D., S. Philip Laucks, M.D., Harold H. MacDougall, M.D.,

Iain L. MacKenzie, M.D., and John P. Whiteley, M.D. (sometimes hereinafter collectively referred to as "the Defendants").

On May 4 and 5, 1981, this Court held a hearing with respect to Weiss's motion for class action certification. Thereafter, on May 28, 1981, this Court granted Weiss's motion for class certification and the Court certified the class to consist of all osteopathic physicians practicing medicine within the York Medical Service Area (hereinafter referred to as "the Plaintiff Class").

After several delays, caused in part by petitions to the Court of Appeals for Writs of Mandamus and Prohibition filed by the Defendants and certain non-party physicians from whom Plaintiff Weiss and the Plaintiff Class (sometimes hereinafter referred to as "the Plaintiffs") sought discovery, *e.g. DeMasi v. Weiss,* 669 F.2d 114 (3d Cir. 1982), the liability phase of this trial was ultimately scheduled for trial on the Court's August, 1982 Harrisburg-Lewisburg list for trial. On August 4, 1982, the jury in this case was selected at the United States Courthouse in Lewisburg, Pennsylvania. Pursuant to a request of all parties and for the convenience of the parties, witnesses and counsel, the Court agreed to hold the trial of this case in Williamsport, Pennsylvania.

The trial of this action commenced on August 11, 1982. On September 1, 1982, a 12-member jury returned unanimous answers to 40 special verdict questions. Thereafter, the Defendants requested the opportunity to present additional evidence to the Court, sitting without a jury, on the question of whether equitable relief should issue under Section 16 of the Clayton Act, 15 U.S.C. § 26. On September 14, 1982, this Court held a hearing with respect to the issue of equitable relief. Following are the Court's findings of fact, discussion, conclusions of law, and order regarding the request of Plaintiff Weiss and the Plaintiff Class for equitable relief.

II. Findings of Fact.

1. The Defendants engaged in business activities in interstate commerce (Special Verdict Question No. 1) (hereinafter "S.V. ____").

2. The Defendants' conduct concerning Plaintiff Weiss and the Plaintiff Class occurred in interstate commerce (S.V. 2).

3. The Defendants' conduct in general had a "not insubstantial" effect on interstate commerce (S.V. 3).

4. The Defendants' conduct concerning Plaintiff Weiss and the Plaintiff Class had a "not insubstantial" effect on interstate commerce (S.V. 4).

5. Plaintiff Weiss would have been granted staff privileges at the York Hospital but for the fact that he was an osteopathic physician rather than an allopathic physician (S.V. 5).

6. The procedures utilized by the Defendants in denying Plaintiff Weiss's application for staff privileges at the York Hospital were unfair taken as a whole (S.V. 6).

7. At least one Defendant conspired with another person or entity to deny Plaintiff Weiss staff privileges at the York Hospital because Weiss was an osteopathic physician but that conspiracy did not constitute an unreasonable restraint upon interstate commerce (S.V. 7, 8).

8. The York Hospital Medical and Dental Staff conspired with another person or entity to deny or impede reasonable, fair, equal, and full access to staff privileges at the York Hospital by osteopathic physicians other than Plaintiff Weiss (S.V. 11, 13).

9. The conspiracy referred to in the previous paragraph constituted an unreasonable restraint upon interstate commerce and caused injury to members of the Plaintiff Class other than Plaintiff Weiss in their businesses and property (S.V. 11.5, 12).

10. A relevant product market for the provision of inpatient hospital health care services supplied by hos-

pitals and their medical staffs has been established (S.V. 14).

11. The York Medical Service Area is the relevant geographic market for the provision of inpatient hospital health care services provided by the Defendants (S.V. 15).

12. The York Hospital had the power to control prices in and exclude competitors from the relevant market (S.V. 16, 17, 18, 19).

13. The York Hospital Medical and Dental Staff had the power to control prices in the relevant market (S.V. 16, 17).

14. The York Hospital Medical and Dental Staff had no power to exclude competitors from the relevant market (S.V. 18, 19).

15. No other Defendant had the power either to control prices in or exclude competitors from the relevant market (S.V. 16, 17, 18, 19).

16. The York Hospital unreasonably exercised the power either to control prices in or exclude competitors from the relevant market to exclude Plaintiff Weiss from York Hospital Staff privileges and thereby caused injury to Plaintiff Weiss in his business or property (S.V. 20, 21, 22).

17. The York Hospital unreasonably exercised the power either to control prices in or exclude competitors from the relevant geographic market to exclude osteopathic physicians from the York Hospital Staff and thereby caused injury to members of the Plaintiff Class, other than Plaintiff Weiss, in their businesses or property (S.V. 23, 24, 25).

18. The York Hospital had the specific intent and purpose to acquire the power to control prices in or to exclude competitors from the relevant market (S.V. 26, 27).

19. No other Defendant had the intent or purpose referred to in the preceding paragraph (S.V. 26, 27).

20. The York Hospital did acts directed to accomplishing a monopoly in the relevant market (S.V. 28, 29).

21. No other Defendant did such acts referred to in the preceding paragraph (S.V. 28, 29).

22. The York Hospital had a dangerous probability of achieving monopoly power in the relevant product and geographic markets (S.V. 30, 31).

23. The conduct of the York Hospital referred to in the preceding paragraph caused injury to Plaintiff Weiss and members of the Plaintiff Class in their businesses or property (S.V. 32, 33).

24. No other Defendant had a dangerous probability of achieving monopoly power in the relevant market (S.V. 30, 31).

25. The York Hospital, Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., and Lois Kushner, M.D. conspired with other persons or entities to obtain the power to control prices and exclude competitors from the relevant market (S.V. 34, 35, 36).

26. Plaintiff Weiss and members of the Plaintiff Class were injured in their businesses or property as a result of the conspiracy referred to in the preceding paragraph (S.V. 37, 38).

27. No other Defendant conspired to obtain the power either to control prices in or exclude competitors from the relevant market (S.V. 34, 35, 36).

28. The York Hospital, Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., and Lois Kushner, M.D. intentionally interfered, without proper cause, with Plaintiff Weiss's contracts with other persons thereby substantially causing injury to Plaintiff Weiss (S.V. 39, 40, 41).

29. The denial of hospital staff privileges to a physician or the revocation of such privileges is a serious adverse professional event which is likely to besmirch the professional reputation of such a physician.

30. The practices of the York Hospital, the York Hospital Medical and Dental Staff, Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., and Lois Kushner, M.D. (hereinafter "these Defendants") which discriminated against osteopathic physicians threaten to result in the exclusion of osteopathic physicians in the York Medical Service Area from access to the services and facilities provided by York Hospital.

31. Discrimination by these Defendants against osteopathic physicians could reasonably be anticipated to cause osteopathic physicians to refrain from applying for staff privileges at the York Hospital.

32. Without staff privileges, a physician cannot admit, effectively follow, or treat patients at the York Hospital.

33. York Hospital has a number of unique services and facilities not available to patients and physicians at any other hospital within the York Medical Service Area.

34. As a result of York Hospital's possession of unique services and facilities, osteopathic physicians lacking staff privileges at York Hospital have been required, if they desired to have their patients treated locally, to refer their patients to allopathic physicians who are members of the York Hospital Medical and Dental Staff for treatment at York Hospital.

35. If osteopathic physicians were permitted access to the services and facilities of York Hospital by affording them staff privileges, and were permitted to admit, follow, and treat their patients at York Hospital, the osteopathic physicians would be less likely to lose patients to their allopathic competitors.

36. Since 1976, eight osteopathic physicians have applied for York Hospital staff privileges.

37. Of the eight osteopathic physicians who have applied for York Hospital Staff privileges, only one application, that of Plaintiff Weiss, has been rejected.

38. At the same time that the application of Plaintiff Weiss was rejected, the application of another osteopathic physician for York Hospital staff privileges was accepted.

39. Since the time that the application of Plaintiff Weiss was rejected, six other osteopathic physicians have applied for York Hospital staff privileges.

40. Of the eight osteopathic physicians who have applied for York Hospital staff privileges, six such applications have been accepted by the York Hospital Board of Directors, and such physicians are members of the York Hospital Medical and Dental Staff and one is dormant awaiting supplementation by the applicant.

III. Discussion.

Plaintiff Malcolm Weiss is an osteopathic physician who practices family medicine in York, Pennsylvania. In 1976, Weiss applied to the York Hospital for staff privileges. Weiss's application was denied by the York Hospital Board of Directors on June 30, 1977. Shortly thereafter, Weiss reactivated his application and was again denied staff privileges on March 13, 1979.

In this lawsuit, Weiss challenges the Defendants' alleged abuse of monopoly power in the delivery of inpatient hospital health care services in the York Medical Service Area to the detriment of osteopathic physicians. During this lawsuit, the Defendants have vigorously asserted that the denial of Weiss's application for staff privileges was not taken as a result of or in consideration of Weiss's status as an osteopathic physician.

After the trial of the liability phase of this action, the jury returned answers to 40 special verdict questions on September 1, 1982. Presently before the Court is the request of Weiss and the Plaintiff Class for equitable relief.

Pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26,

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any

> court of the United States having jurisdiction over the parties, against threatened loss or damages by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damages granted by courts of equity, under the rules governing such proceedings. . . .

Thus, before Plaintiff Weiss and the Plaintiff Class are entitled to equitable relief under the antitrust laws, they must show first, that the Defendants violated the antitrust laws and injured the Plaintiff or Plaintiff Class thereby and second, that the injuries to the Plaintiff and Plaintiff Class are of a type appropriately subject to equitable relief. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 129-33, 89 S.Ct. 1562, 1579-1581, 23 L.Ed.2d 129 (1969). *Cf. Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972); *Midwest Paper Products Co. v. Continental Group*, 596 F.2d 573 (3d Cir. 1979).

The parties and the Court are in agreement that they are entitled to a jury determination of the factual issues involved in the claims of Weiss and the Plaintiff Class. *E.g. Simler v. Conner*, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963) (per curiam). The parties and the Court are further in agreement that the jury's findings are binding on the Court with respect to the Court's determination of entitlement to equitable relief. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *G.T.E. Sylvania, Inc. v. Continental TV, Inc.*, 537 F.2d 980, 986-7 (9th Cir.1976) (en banc), *aff'd* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

Appendix B

A. Violations of the Sherman Act.

The Court must determine whether the jury's findings of fact satisfy the first prerequisite to equitable relief, namely whether or not there was a violation of the antitrust laws and Plaintiff Weiss and the Plaintiff Class were injured thereby. In this lawsuit, Plaintiff Weiss and the Plaintiff Class contend that the Defendants violated the antitrust laws in four particulars. Plaintiff Weiss and the Plaintiff Class each argue that the Defendants conspired to exclude them from staff privileges at York Hospital in violation of Section 1 of the Sherman Act; and monopolized, attempted to monopolize, and conspired to monopolize unreasonably to exclude Plaintiff Weiss and the Plaintiff Class from staff privileges at York Hospital in violation of Section 2 of the Sherman Act.

1. Conspiracy to Exclude Plaintiff Weiss and the Plaintiff Class.

Section 1 of the Sherman Act makes illegal "Every contract, combination . . . or conspiracy in restraint of trade or commerce among several states . . ." 15 U.S.C. § 1. In order to establish a Section 1 violation, the Plaintiff or Plaintiff Class must establish (1) a conspiracy among the Defendants and other alleged co-conspirators, (2) which results in an unlawful and unreasonable restraint upon interstate commerce, and (3) which causes injury to the Plaintiff or Plaintiff Class in their businesses or property.

With respect to Plaintiff Weiss's individual claim of conspiracy to deny him staff privileges at the York Hospital, the jury found that such a conspiracy existed. However, the jury found that such a conspiracy did not constitute an unreasonable restraint upon interstate commerce. Despite the findings of the jury, Plaintiff Weiss now argues that the aforementioned conspiracy constitutes a per se unreasonable restraint upon interstate commerce. Therefore, Weiss argues, the jury's answer to Spe-

cial Verdict Question No. 8 should be disregarded and the Court should find as a matter of law that the Defendants conspired in violation of the Sherman Act. Since Plaintiff Weiss has otherwise established liability of the York Hospital and the York Hospital Medical and Dental Staff to him under the antitrust laws, the Court need not decide at this time whether the conspiracy to deny Plaintiff Weiss staff privileges at the York Hospital is in violation of the Sherman Act.

In contrast to the individual claim of Plaintiff Weiss, the jury found with respect to the claim of the Plaintiff Class both that there was a conspiracy to deny or impede reasonable, fair, equal, or full access to staff privileges at the York Hospital by osteopathic physicians other than Plaintiff Weiss and that this conspiracy constituted an unreasonable restraint upon interstate commerce. The jury further found that the York Hospital Medical and Dental Staff was involved in that conspiracy and that the conspiracy caused injury to members of the Plaintiff Class other than Plaintiff Weiss in their businesses or property. Since all of the elements of a violation of Section 1 of the Sherman Act were found by the jury, this Court concludes as a matter of law that the York Hospital Medical and Dental Staff violated Section 1 of the Sherman Act and thereby injured members of the Plaintiff Class.

2. Monopoly Claims of Plaintiff Weiss and the Plaintiff Class.

Section 2 of the Sherman Act provides in pertinent part that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States ... ." violates the Sherman Act. 15 U.S.C. § 2.

Appendix B

(a) Monopolization Claims.

The offense of monopolization is established if (1) relevant product and geographic markets have been established, (2) the Defendants had the power to control prices in or exclude competitors from the relevant market, (3) the Defendants unreasonably used such power to exclude Plaintiff Weiss or the Plaintiff Class from York Hospital staff privileges, and (4) Plaintiff Weiss or the Plaintiff Class were injured in their businesses or property as a result of the Defendants' conduct.

The jury unanimously found that a relevant product market for the provision of inpatient hospital health care services supplied by hospitals and their medical staffs and a relevant geographic market for the provision of those services had been established. The jury further found that the York Hospital had the power both to control prices in and exclude competitors from the relevant market. The jury found that the York Hospital exercised such monopoly power unreasonably to exclude both Plaintiff Weiss and the Plaintiff Class from York Hospital staff privileges and that both Plaintiff Weiss and Plaintiff Class were injured in their businesses or property as a result of the conduct of the York Hospital. Thus, the jury found all the facts necessary to support the legal conclusion that the York Hospital violated Section 2 of the Sherman Act by monopolizing to exclude Plaintiff Weiss and the Plaintiff Class from staff privileges at York Hospital.

The jury also found that individual defendants Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., and Lois Kushner, M.D., acted unreasonably to exclude Plaintiff Weiss and the Plaintiff Class from York Hospital staff privileges and thereby injured Plaintiff Weiss and the Plaintiff Class. However, the jury did not find that these individual Defendants had either the power to control prices in or exclude competitors from

the relevant market. Thus, these individual Defendants did not violate Section 2 of the Sherman Act with respect to the offense of monopolization. 15 U.S.C. § 2.

The jury also found that the York Hospital Medical and Dental Staff had the power to control prices in the relevant market. However, since the jury did not find that the York Hospital Medical and Dental Staff used that power unreasonably to exclude either Plaintiff Weiss or the Plaintiff Class from York Hospital staff privileges, the York Hospital Medical and Dental Staff did not violate Section 2 of the Sherman Act with respect to the offense of monopolization. 15 U.S.C. § 2.

(b) Claims of Attempt to Monopolize.

The offense of attempted monopolization is established if the Defendants had a specific intent to monopolize, did overt acts in furtherance of that intent, and had a dangerous probability of achieving monopolization of a particular product and geographic market. *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, 386 (8th Cir. 1974); *Structure Probe, Inc. v. Franklin Institute*, 450 F.Supp. 1272, 1281-82 (E.D.Pa.1978), aff'd, 595 F.2d 1214 (3d Cir. 1979) (memorandum).

With respect to the contentions of Plaintiff Weiss and the Plaintiff Class that the Defendants violated Section 2 of the Sherman Act by committing the offense of attempted monopolization, the jury found that the York Hospital had the specific intent to acquire the power to control prices in or exclude competitors from the relevant markets, did acts directed to accomplishing monopoly power in the relevant market, and had a dangerous probability of achieving monopoly power in the relevant market. Furthermore, the jury found that both Plaintiff Weiss and the Plaintiff Class were injured as a result of the Defendants' attempted monopolization. Consistent with the jury's findings, as a matter of law this Court

concludes that the York Hospital violated Section 2 of the Sherman Act with respect to the offense of attempted monopolization.

(c) Claims of Conspiracy to Monopolize.

Under Section 2 of the Sherman Act, a conspiracy to monopolize is also outlawed. To establish a conspiracy to monopolize in violation of the Sherman Act, Plaintiff Weiss or the Plaintiff Class must establish (1) that the Defendants conspired to obtain the power to control prices in or exclude competitors from the relevant market; (2) that there was a specific intent to monopolize, *e.g. V. & L. Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F.Supp. 643, 651 (E.D.Pa.1975); *United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545, 567(E.D.Pa.1960), *aff'd*, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961) (memorandum); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961) (". . . the essential element is . . . the specific intent to monopolize. . . ."); and (3) that overt acts were performed by a party to the conspiracy and in furtherance thereof.

With respect to the claims of Plaintiff Weiss and the Plaintiff Class that the Defendants violated Section 2 of the Sherman Act by conspiring to monopolize, the jury found that the York Hospital conspired with other persons or entities to obtain the power to control prices in or exclude competitors from the relevant market. The York Hospital was also found to have done overt acts directed to accomplishing the monopoly power in the relevant market and to have had the specific intent and purpose to acquire the power to control prices in or exclude competitors from the relevant market. The jury further found that both Plaintiff Weiss and the Plaintiff Class were injured in their businesses or property by such a conspir-

acy. Thus, the Court concludes as a matter of law that the York Hospital violated Section 2 of the Sherman Act with respect to the offense of conspiracy to monopolize.

The jury also found that individual Defendants Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., and Lois Kushner, M.D. conspired to obtain the power to exclude competitors from or control prices in the relevant market. While the specific intent to monopolize is an essential element of a claim of a conspiracy to monopolize, *V. & L. Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F.Supp. 643, 651 (E.D.Pa. 1975), the jury made no finding that these individual Defendants had such specific intent to monopolize. Nonetheless, Plaintiff Weiss and the Plaintiff Class argue that the jury's finding that these individual Defendants conspired to monopolize, when interpreted in light of the Court's charge to the jury, must constitute a conclusion that these individual Defendants conspired to monopolize in violation of Section 2 of the Sherman Act. This Court does not agree. The jury's findings of fact expressly indicate that the individual Defendants did *not* have the specific intent or purpose to acquire either the power to control prices in or to exclude competitors from the relevant product and geographic markets. *See* Jury's Answers to Special Verdict Questions Nos. 26, 27. Thus, these individual Defendants may not be held to have violated Section 2 of the Sherman Act with respect to the offense of conspiracy to monopolize.

3. Summary of Jury's Findings Regarding Violations by the Defendants of the Sherman Act.

The York Hospital Medical and Dental Staff violated Section 1 of the Sherman Act with respect to the Plaintiff Class. The York Hospital violated Section 2 of the Sherman Act with respect to Plaintiff Weiss and the Plaintiff Class. Thus, Plaintiff Weiss and the Plaintiff Class have satisfied the first prerequisite to equitable relief.

B. Propriety of Equitable Relief.

Having established that the antitrust laws have been violated by York Hospital and the York Hospital Medical and Dental Staff, the only remaining question to be addressed by the Court is whether these violations of the antitrust laws have caused "threatened loss or harm" of a type which would warrant the entry of an injunction by the Court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 129, 131, 89 S.Ct. 1562, 1579, 1580, 23 L.Ed.2d 129 (1969). Quite clearly, the burden is upon Plaintiff Weiss and the Plaintiff Class to establish that equitable relief is appropriate in this lawsuit. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

In addition to serving the purpose of relief to a private Plaintiff, *e.g. United States v. Borden*, 347 U.S. 514, 74 S.Ct. 703, 98 L.Ed. 903 (1954), the purpose of injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26 is to ensure enforcement of the antitrust laws. *Zenith Radio*, 395 U.S. at 131, 89 S.Ct. at 1580. Thus, the Supreme Court has admonished that:

> Section 16 should be construed and applied with this purpose [of enforcing the antitrust laws] in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims. . . ." Its availability should be "conditioned by the necessities of the public interest which Congress has sought to protect." *Zenith Radio*, 395 U.S. at 131, 89 S.Ct. at 1580, *quoting Hecht Co. v. Bowles*, 321 U.S. 321, 329-30, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944).

The language of Section 16 of the Clayton Act provides that injunctive relief is available "under the same

conditions and principles as injunctive relief against threatened conduct that will cause loss or damage as granted by courts of equity." 15 U.S.C. § 26. Despite the arguments of Plaintiff Weiss and the Plaintiff Class to the contrary, this Court is convinced that equitable relief under Section 16 of the Clayton Act may be granted only where there is no adequate remedy at law. *Goadby v. Philadelphia Electric Co.*, 639 F.2d 117 (3d Cir. 1981); *Leasco Corp. v. Taussig*, 473 F.2d 777 (2d Cir. 1972). Plaintiff Weiss and the Plaintiff Class refer to the opinion of the Court of Appeals of this Circuit in *Mid-West Paper Products Co. v. Continental Group*, 596 F.2d 573 (3d Cir. 1979) in support of the proposition that availability of a damages remedy is irrelevant to the question of equitable relief under the Clayton Act. This citation is inappropriate, unpersuasive, and irrelevant on this point. Plaintiffs argue that because irreparable injury need not be shown for equitable relief, *Mid-West Paper*, 596 F.2d at 594 n. 85; *Zenith Radio*, 395 U.S. at 130, 131, 89 S.Ct. at 1579, 1580, availabilty of a damages remedy does not preclude equitable relief. The concept of irreparable injury is not equivalent to the concept of adequacy of legal remedies. *E.g. Baldwin Metals Co., Inc. v. Donovan*, 642 F.2d 768 (5th Cir. 1981) (both irreparable injury and no adequate legal remedy must normally be shown). *Cf. Reed Enterprises v. Corcoran*, 354 F.2d 519 (D.C.Cir.1965). While inquiry into the existence of irreparable injury is related to a request for a permanent injunction, it is not determinative of the issue.

While Plaintiff Weiss must bear the heavy burden of demonstrating that there is no adequate remedy at law for violations by the York Hospital and the York Hospital Medical and Dental Staff of the antitrust laws, *e.g. United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953), this Court is convinced that this burden has been met. In particular, the jury in this case found not only that the York Hospital and the

York Hospital Medical and Dental Staff violated the antitrust laws but that their conduct had a "not insubstantial" effect on interstate commerce. The jury has not explicitly found that in addition to injury to Plaintiff Weiss and the Plaintiff Class, the public consumers of medical care in the York Medical Service Area and in particular of inpatient hospital health care services have been injured by the conduct of the York Hospital and the York Hospital Medical and Dental Staff. However, such a factual conclusion is a reasonable inference which may be drawn from the jury's findings. Even assuming that a monetary award might constitute an adequate legal remedy to Plaintiff Weiss and members of the Plaintiff Class injury to the public resulting from the intangible effect the conduct of the York Hospital and the York Hospital Medical and Dental Staff has had on a free and open economy will not be remedied absent injunctive relief.

Furthermore, it is quite obvious that the injury to Plaintiff Weiss and the Plaintiff Class will not fully be remedied absent equitable relief. Likely, injury to Plaintiff Weiss and members of the Plaintiff Class resulting from their past exclusion from staff privileges at the York Hospital could be remedied by a monetary award of damages. However, absent an injunction, there is no guarantee that the injuries by the York Hospital and the York Hospital Medical and Dental Staff will abate. Thus, there is threatened future harm absent issuance of an injunction. *E.g. United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953); *Mid-West Paper,* 596 F.2d at 594 n. 85 (3d Cir. 1979) (Plaintiff "must establish 'a significant threat of injury' "). The York Hospital and the York Hospital Medical and Dental Staff would have this Court conclude that since no osteopath other than Plaintiff Weiss has had his application for staff privileges at the York Hospital rejected an injunction is unnecessary because there is no threat of future violation. *See* Finding of Fact ¶¶36, 37, 38, 39, 40. Nonethe-

less, this Court is of the opinion that members of the Plaintiff Class were dissuaded from applying for staff privileges at the York Hospital based on a belief that their applications for staff privileges would not fairly be treated and that they would be denied access to those staff privileges because they were not allopathic physicians. Given the facts found by the jury and this Court's finding that denial of staff privileges is a significant adverse professional event for a physician, this collective belief of the Plaintiff Class was reasonable under the circumstances. Because there is a substantial threat of injury to members of the Plaintiff Class from violations of the antitrust laws by the York Hospital and the York Hospital Medical and Dental Staff and because those violations by the Defendants are likely to continue or recur absent issuance of equitable relief, *Mid-West Paper*, 596 F.2d at 591 (3d Cir. 1979), an injunction is appropriate in this situation.

C. Proposed Equitable Relief.

On September 14, 1982, Plaintiff Weiss and the Plaintiff Class submitted a proposed equitable order for consideration by the Court. The proposed equitable relief is far-reaching and comprehensive in scope. The proposal for relief requests that an injunction be issued against the York Hospital and the York Hospital Medical and Dental Staff, as well as individual Defendants Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., and Lois Kushner, M.D. Inasmuch as it is the opinion of this Court that findings of the jury are to the effect that the individual Defendants did not violate the antitrust laws, equitable relief against them is improper. With respect to the York Hospital and the York Hospital Medical Staff, Plaintiff Weiss and the Plaintiff Class request first, that the York Hospital and the York Hospital Medical and Dental Staff be restrained and enjoined from undertaking any overt act against members of the Plaintiff Class

or Plaintiff Weiss which would in any way impede or deny Plaintiff Weiss or members of the Plaintiff Class fair, reasonable or equal access to the facilities of York Hospital. In this regard, the Plaintiffs request that applications of osteopathic physicians be subject to the same standard of review as applications of allopathic physicians. Furthermore, the Plaintiffs request that "personality and other criteria lacking professional basis or justification shall not be considered in review of osteopathic physicians' applications . . ." (Proposed Order ¶4.1). Second, the Plaintiffs request that the York Hospital and the York Hospital Medical and Dental Staff be restrained and enjoined from undertaking any overt act against the Plaintiff Class or Plaintiff Weiss which disparages the medical abilities of osteopathic physicians (Proposed Order ¶4.2). Third, the Plaintiffs request that the individual Defendants be restrained from participating in the process of review and judgment of applications for staff privileges for a period of 10 years (Proposed Order ¶4.3). Fourth, the Plaintiffs request that in order to remedy past unlawful practices, action be taken by the York Hospital and the York Hospital Medical and Dental Staff to advertise the results of this lawsuit and to invite osteopathic physicians to apply for staff privileges at York Hospital (Proposed Order ¶4.4). Fifth, the Plaintiffs request that Plaintiff Weiss be granted staff privileges at York Hospital at the level of "active staff of the Family Practice Department" and that no action be taken to strip Plaintiff Weiss of those staff privileges without prior approval of this Court (Proposed Order ¶4.5). Sixth, the Plaintiffs request a statement by the Court that any retaliation for the filing of or participation in this lawsuit by any of the Defendants against Plaintiff Weiss or Plaintiff Class be declared illegal (Proposed Order ¶4.6). Seventh, the Plaintiffs request that the By-Laws of the Medical Staff of York Hospital be amended and that the individual Defendants be specifically ordered to abide by the amended By-Laws.

In particular, the Plaintiffs request that language be added to the By-Laws to the effect that "no physicians may be denied staff privileges or have their privileges curtailed or removed [at the York Hospital] as a consequence of possessing or obtaining staff privileges at Memorial Osteopathic Hospital . . ."; that applicants for staff privileges be informed of unfavorable action taken by the Credentials or Executive Committee within 10 days after such action is taken; that osteopathic physicians who are dissatisfied with any decision of the Board of Directors of the York Hospital have special rights to seek review of those decisions; that osteopathic physicians applying for a change in staff status at York Hospital not be required to obtain a letter of recommendation from the Department Chairman; that temporary staff privileges at York Hospital be granted to osteopathic physicians on the same basis as other physicians; that when evaluating an application for reappointment to staff privileges, the York Hospital committees not consider the applicant's ethics and conduct, cooperation with hospital personnel, relations with other practitioners, and general attitude toward patients, the hospital, and the public; that a special appeals mechanism for review of suspension, revocation, or denial of an application for staff privileges of osteopathic physicians be created; that references to "American Boards of Medical Specialties" be modified so that these references not exclude osteopathic boards of medical specialties; that the compositions of the various committees at the York Hospital be modified to include full representation by osteopathic physicians; and that meetings of the Medical Staff at the York Hospital not be scheduled to conflict with meetings of the Medical Staff of Memorial Osteopathic Hospital (Proposed Order ¶4.7). Eighth, the Plaintiffs request that each member of the York Hospital Medical and Dental staff be required to receive a copy of the equitable order in this case and be required to sign his agreement to abide thereby (Pro-

posed Order ¶4.8). The Plaintiffs further request, ninth, that notice be given to the Plaintiff Class of this Court's Order (Proposed Order ¶5), tenth, that counsel for the Plaintiff Class be granted leave to file a request for attorney's fees and costs (Proposed Order ¶ 6), and, eleventh, that this Court retain jurisdiction over the matter to enforce this Court's Order (Proposed Order ¶ 7).

In the view of the undersigned, the provisions of the proposed order go far beyond any equitable relief which is justified in this lawsuit. Some of the requested relief is simply inappropriate because the parties against whom that relief is requested have been found by the Court not to have violated the antitrust laws. Some of the relief such as amendments to the By-Laws of the York Hospital Medical Staff are grossly intrusive upon the autonomy of that body and are unjustified under the circumstances. Further, this Court is of the opinion that it has neither the technical expertise nor appropriate guidance from the parties to consider modifications of the By-Laws as proposed by Plaintiff Weiss and the Plaintiff Class. In the view of this Court, the proposed amendments to the By-Laws of the York Hospital Medical Staff go far beyond any discrimination which existed in this case. Furthermore, the kind of "affirmative action" which Plaintiff Weiss and the Plaintiff Class request would be appropriate only were there evidence of invidious discrimination. No such evidence has been presented. Indeed, the only evidence of any impropriety with respect to the By-Laws of the York Hospital Medical Staff relates to the requirement for staff members that they be certified by an appropriate "American Board of Medical Specialties." Were it the case that the interpretation proposed by Plaintiff Weiss and the Plaintiff Class that the foregoing phrase refers only to allopathic boards of specialties and excludes osteopathic boards of specialties, the Court would be inclined to modify this phrase. However, the Court is of the opinion that the phrase is, at worst, ambiguous.

Thus, rather than ordering that the By-Laws be amended, the Court will direct that the phrase "American Board of Medical Specialties" be interpreted to include both allopathic and osteopathic boards of medical specialties.

Furthermore, a portion of the proposed relief appears to be particularly inappropriate. In particular, individual members of the York Hospital Medical and Dental Staff would be required under the proposed order to acknowledge receipt of the Court's order and to agree to be bound thereby. No authority is stated for the proposition that this Court can bind persons who are not parties to this lawsuit in the situation where those non-parties are not acting in concert with parties to this lawsuit. Indeed, the Court doubts such authority exists. F.R.Civ.P. 65(d). *See, e.g., Backo v. Local 281,* 438 F.2d 176 (2d Cir. 1970), *cert. denied,* 404 U.S. 858, 92 S.Ct. 110, 30 L.Ed.2d 99 (1971); *Lankford v. Gelston,* 364 F.2d 197 (4th Cir. 1966); *Le Tourneau v. N. L. R. B.,* 150 F.2d 1012 (5th Cir. 1945). With respect to the request of the Plaintiffs that they be granted leave to file a request for attorney's fees and costs, the Court considers that there is no need for the grant of such authority. Finally, the Plaintiffs' request that Plaintiff Weiss be placed on the active staff of the Family Practice Department of the York Hospital is unjustified. Plaintiff Weiss has established to the satisfaction of this Court and the jury only that he was discriminated against because he was an osteopath. While the jury found that but for the fact that Plaintiff Weiss was an osteopathic physician, he would have been admitted to staff privileges at the York Hospital, such a finding of fact does not, alone, entitle Plaintiff Weiss to equitable relief beyond that given to the Plaintiff Class.

Although the broad requested relief is not appropriate, more modest injunctive relief will be ordered.

IV. Conclusions of Law.

1. The York Hospital Medical and Dental Staff conspired to deny or impede reasonable, fair, equal, or full access to staff privileges at York Hospital by osteopathic physicians, in violation of Section 1 of the Sherman Act.

2. The York Hospital committed the offense of monopolization in violation of Section 2 of the Sherman Act unreasonably to exclude both Plaintiff Weiss and the Plaintiff Class from York Hospital Staff privileges.

3. The York Hospital committed the offense of attempt to monopolize in violation of Section 2 of the Sherman Act by attempting to acquire the power to control prices in or exclude competitors from the relevant market resulting in injury to Plaintiff Weiss and the Plaintiff Class.

4. The York Hospital committed the offense of conspiracy to monopolize in violation of Section 2 of the Sherman Act by conspiring with others to obtain the power to control prices in or exclude competitors from the relevant market, resulting in injury to Plaintiff Weiss and the Plaintiff Class.

5. The individual Defendants have not violated the antitrust laws.

6. There is a significant threat of injury to Plaintiff Weiss and the Plaintiff Class from violations by the York Hospital and the York Hospital Medical and Dental Staff of the antitrust laws and such violations are likely to continue or recur.

7. Both Plaintiff Weiss and the Plaintiff Class have no adequate remedy at law for the violations by the York Hospital and the York Hospital Medical and Dental Staff of the antitrust laws.

8. Equitable relief for Plaintiff Weiss and the Plaintiff Class is necessary.

An appropriate order will be entered.

Appendix B

ORDER

1. Pursuant to the Court's authority under 15 U.S.C. § 26, this Court hereby declares that the following equitable relief shall be entered against Defendants York Hospital and York Hospital Medical and Dental Staff:

1.1 The York Hospital and the York Hospital Medical and Dental Staff are restrained and enjoined from undertaking any overt act against either Plaintiff Weiss or members of the Plaintiff Class which would in any way impede or deny the Plaintiffs full, reasonable, fair, or equal access to the facilities of York Hospital and full, reasonable, fair or equal access to staff privileges at the York Hospital.

1.2 The York Hospital and the York Hospital Medical and Dental Staff are restrained and enjoined from applying standards of review to applications by osteopathic physicians for staff privileges at the York Hospital different from the standards of review applicable to similar applications of allopathic physicians.

1.3 The York Hospital and the York Hospital Medical and Dental Staff are restrained and enjoined from interpreting the expression "American Board of Medical Specialty" as used in the York Hospital Medical Staff By-Laws to exclude osteopathic boards of medical specialty.

2. Members of the Plaintiff Class shall, within 30 days after the date of this order, be notified by the attorneys for the Plaintiff Class by certified mail, return receipt requested, of the finding of liability against the York Hospital and the York Hospital Medical and Dental Staff of the terms of this order, and of the right of members of the Plaintiff Class to claim damages and the necessity of

sending a claim form to the Clerk of Court. The notice shall read as follows:

> In *Weiss vs. York Hospital, et al.*, Civil No. 80-0134 (M.D.Pa. September 30, 1982), Plaintiff Weiss brought suit against the Defendants on behalf of himself and a class of osteopathic physicians in the York Medical Service Area, claiming that both Plaintiff Weiss and the Plaintiff Class had been excluded from staff privileges at the York Hospital and that such exclusion was illegal under the antitrust laws, 15 U.S.C. §§ 1, 2. A finding of liability has been entered on behalf of Plaintiff Weiss and on behalf of the Plaintiff Class. As a member of the Plaintiff Class, you are permitted to claim damages at a hearing to be held by this Court. If you wish to participate at that hearing and to claim damages, it is required that you complete the enclosed form and return it to the Clerk of Court. The enclosed form must be received by the Clerk of Court by November 30, 1982. If the Clerk of Court does not receive the enclosed form, you will lose and waive any rights you may have to claim damages. Please return the form to:
>
> Clerk
> United States District Court
> Middle District of Pennsylvania
> United States Courthouse
> Williamsport, Pennsylvania, 17701
>
> You may be represented by an attorney of your choice in the damages phase of this proceeding. However, if you wish to be represented by your own counsel, you must so notify the Court in your notice of claim. Otherwise, you will be represented by Levin and Fishbein, 320 Walnut Street, Suite 600, Philadel-

phia, Pennsylvania, 19106 and Markowitz & Seidensticker, P. C., 55 South Queen Street, York, Pennsylvania, 17403.

3. The claim form to be distributed to members of the Plaintiff Class shall read as follows:

> I, _____(print full name) have been informed of my right to claim damages as a member of the class of osteopathic physicians in the action of *Weiss vs. York Hospital, et al.*, No. 80-0134 (M.D.Pa. and ____will ____will not (check one) present a claim. I ____will ____will not (check one) be represented by Markowitz & Seidensticker and Levin and Fishbein.
>
> _____
>
> Signature.

4. Jurisdiction is reserved to issue such further orders as may be advisable.

5. The Clerk of Court shall enter judgment on liability consistent with the jury's answers to the special verdict questions and this Court's opinion and order entered today.

6. The damages phase of this trial is hereby placed on the Court's February 1983 list for trial in Williamsport.

7. A settlement conference will be held in this case on January 3, 1983.

8. A pre-trial conference will be held in this case on February 2, 1983.

9. Jury selection will be held in this case commencing at 10:00 A.M. on February 3, 1983.

10. All discovery shall be completed by January 14, 1983.

_____

Appendix B

JUDGMENT ON SPECIAL VERDICT

This action came on for trial before the Court and a jury, Honorable Malcolm Muir, District Judge, presiding, and the issues having been duly tried and the jury having rendered its special verdict,

IT IS ORDERED AND ADJUDGED that the York Hospital Medical and Dental Staff is liable to the Plaintiff Class for violations of Section 1 of the Sherman Act;

FURTHER, that the York Hospital is liable to Plaintiff Malcolm Weiss and the Plaintiff Class for violations of Section 2 of the Sherman Act;

FURTHER, that the York Hospital, Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., and Lois Kushner, M.D., are liable to Plaintiff Malcolm Weiss for tortiously interfering with his contractual relations with third parties;

IT IS FURTHER ADJUDGED that Gary Ardison, M.D., Jack A. Kline, M.D., S. Philip Laucks, M.D., Harold H. MacDougall, M.D., Iain L. MacKenzie, M.D., and John P. Whiteley, M.D., are not liable to either Plaintiff Malcolm Weiss or the Plaintiff Class;

FURTHER, that as against the Defendants named in the preceding paragraph Plaintiff Malcolm Weiss and the Plaintiff Class shall take nothing and this action shall be dismissed as to the Defendants named in the preceding paragraph.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-3507, 82-3580, 82-3581

WEISS, MALCOLM,
Appellant in No. 82-3581

vs.

YORK HOSPITAL and THE MEDICAL AND DENTAL STAFF OF THE YORK HOSPITAL, et al.
Appellants in Nos. 82-3507 & 82-3580

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until January 23, 1985.

/s/ Edward R. Becker
Circuit Judge

Dated: November 30, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-3507, 82-3580, 82-3581

MALCOLM WEISS,
Appellee/Cross-Appellant

vs.

YORK HOSPITAL, etc.,
Appellants/Cross-Appellees

Present: BECKER and VAN DUSEN, *Circuit Judges*

1. Motion of York Hospital and the Medical and Dental Staff of York Hospital for an Order staying the effectiveness of paragraph 1 of the injunction pending final action by the Supreme Court of the United States on the Medical Staff's application for a writ of certiorari.

2. Memorandum of Law in support of above motion.

3. For your information an Order was filed by this Court staying the issuance of the certified judgment in lieu of formal mandate to and including January 23, 1985.

in the above-entitled cases. Any Answer which would be due by December 24, 1984 will be forwarded upon receipt of same.

Respectfully,

/s/ Sally Mrvos
Clerk

The foregoing Motion is granted.

By the Court,

/s/ Edward R. Becker
Circuit Judge

Dated: December 17, 1984

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-3507, 82-3580, 82-3581

No. 82-3507

WEISS, Malcolm

vs.

YORK HOSPITAL and THE MEDICAL AND DENTAL STAFF OF THE YORK HOSPITAL

1001 South George Street
York, PA

LAUCKS, S. PHILIP, M.D.,
MacDOUGALL, HAROLD H., M.D.,
MacKENZIE, IAIN L., M.D.,
WHITELY, JOHN P., M.D.,
DEISHER, S.W., M.D.,
(Executive Committee—
KLINE, JACK A., M.D., KUSHNER, LOIS, M.D.,
BUTLER, IVAN L., M.D., ARDISON, GARY, M.D.
and BAUER, THOMAS L., M.D.)

York Hospital and the Medical and
Dental Staff of York Hospital,

Appellants

Appendix E

No. 82-3580

WEISS, Malcolm

vs.

YORK HOSPITAL and THE MEDICAL AND DENTAL STAFF OF THE YORK HOSPITAL

1001 South George Street
York, PA

ADDITIONAL DEFENDANTS — 6/2/80

LAUCKS, S. PHILIP, M.D.,
MacDOUGALL, HAROLD H., M.D.,
MacKENZIE, IAIN L., M.D.,
WHITELY, JOHN P., M.D.,
DEISHER, S.W. M.D.,
(Executive Committee — KLINE, JACK A., M.D.,
KUSHNER, LOIS, M.D., BUTLER, IVAN L., M.D.,
ARDISON, GARY, M.D. and
BAUER, THOMAS L., M.D.)

York Hospital, The Medical and Dental
Staff of York Hospital, Thomas L. Bauer,
Ivan L. Butler, Samuel W. Deisher,
Lois Kushner,

Appellants

No. 82-3581

WEISS, Malcolm,

Appellant

vs.

YORK HOSPITAL and THE MEDICAL AND DENTAL STAFF OF THE YORK HOSPITAL
1001 South George Street
York, PA

Appendix E

ADDITIONAL DEFENDANTS — 6/2/80

LAUCKS, S. PHILIP, M.D.,
MacDOUGALL, HAROLD H., M.D.,
MacKENZIE, IAIN L., M.D.,
WHITELY, JOHN P., M.D.,
DEISHER, S.W., M.D.,
(Executive Committee — KLINE, JACK A., M.D.,
KUSHNER, LOIS, M.D., BUTLER, IVAN L., M.D.,
ARDISON, GARY, M.D. and BAUER, THOMAS L., M.D.)

(D.C. Civil Action No. 80-0134)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: Adams* and Becker, *Circuit Judges*, and
Van Dusen, *Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel November 15, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeal at No. 82-3580 filed December 9, 1982, from orders of the said District Court entered November 18 and 22, 1982, is hereby dismissed for lack of appellate jurisdiction. It is further ordered and adjudged by this Court that the appeal at No. 82-3507 from the two orders of the said District Court entered September 30, 1982, and the plaintiff's cross-appeal at No. 82-3581, from the order and judgment of the said District Court entered November 18, 1982, cer-

* After the oral argument Judge Adams recused and did not participate in the resolution of this appeal.

tifying as final its judgment on the Special Verdict entered September 30, 1982, are affirmed in part and reversed in part and the cause remanded for further proceedings as follows:

1. the District Court's decision that the medical staff violated section 1 as to the plaintiff class is affirmed;

2. the District Court's decision that Weiss was entitled to the same injunctive relief under section 1 is affirmed;

3. the District Court's finding of liability in favor of Weiss and the class against York on section 2 grounds is reversed;

4. the District Court's issuance of an injunction was proper although the within cause is hereby remanded to the District Court for reconsideration of the scope of the injunction in light of the opinion of this Court;

5. on remand, the District Court which will try the damages claims, must afford the defendants the opportunity to raise the defenses that members of the class did not make demand for staff privileges, and that any such application, including that of Weiss, was properly refused because of the doctor's lack of professional competence or character. It is further ordered and adjudged that to the extent the District Court may have addressed the latter question with respect to Weiss in its findings and judgment, a partial new trial is hereby granted;

6. the District Court's decisions absolving the individual defendants on various claims, which decisions are based on the jury's answers to the special verdict questions, are hereby affirmed;

7. the defendants' request to reassign the within cause on remand to a different judge is hereby denied.

All the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos

Clerk

September 27, 1984

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-3507, 82-3580, 82-3581

MALCOLM WEISS,
Appellee in Nos. 82-3507 & 82-3580
Cross-Appellant in No. 82-3581

v.

YORK HOSPITAL and THE MEDICAL AND DENTAL STAFF OF YORK HOSPITAL, S. PHILIP LAUCKS, M.D., HAROLD H. MacDOUGALL, M.D., IAIN L. MacKENZIE, M.D., JOHN P. WHITELY, M.D., S.W. DEISHER, M.D., (Executive Committee—JACK A. KLINE, M.D., LOIS KUSHNER, M.D., IVAN L. BUTLER, M.D., GARY ARDISON, M.D., and THOMAS L. BAUER, M.D.),
Appellants in Nos. 82-3507 & 82-3580
Cross-Appellees in No. 82-3581

SUR PETITION FOR REHEARING

Present: SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and VAN DUSEN, *Senior Circuit Judge**

The petition for rehearing filed by The Medical and Dental Staff of York Hospital, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available

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* As to panel rehearing only.

circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Edward R. Becker
Judge

Dated: October 25, 1984

APPENDIX G

FEDERAL MEDICARE REGULATIONS

Subpart J—Conditions of Participation; Hospitals

AUTHORITY: Secs. 1102, 1154(a)(10), 1861 (e), (f), (g), and (k), 1871, and 1886 of the Social Security Act, as amended (42 U.S.C. 1302, 1395x (e), (f), (g), and (k), 1395hh, and 1395ww).

SOURCE: 31 FR 13424, Oct. 18, 1966; 32 FR 136 Jan. 7, 1967, unless otherwise noted. Redesignated at 42 FR 52826, Sept. 30, 1977.

§ 405.1011 Provision of emergency services by nonparticipating hospitals.

An institution which has not been determined by the Secretary as being in compliance with all of the conditions, or which is not accepted to become a participating hospital may, nevertheless, be paid under the program for emergency services furnished provided it meets the requirements of section 1861(e) (1), (2), (3), (4), (5), and (7) of the Act, as amended.

§ 405.1020 Condition of participation—compliance with State and local laws.

The hospital is in conformity with all applicable State and local laws.

(a) *Standard; licensure of hospital.* The hospital, in any State in which State or applicable local law provides for the licensing of hospitals, is (1) licensed pursuant to such law, or (2) approved, by the agency of the State or locality responsible for licensing hospitals, as meeting the standards established for such licensing.

(b) *Standard; licensure or registration of personnel.* Staff of the hospital is licensed or registered in accordance with applicable laws.

(c) *Standard; conformity with other laws.* The hospital is in conformity with laws relating to fire and safety, to communicable and reportable diseases, to postmortem examinations, and to other relevant matters.

§ 405.1021 Condition of participation—Governing body.

The hospital has an effective governing body legally responsible for the conduct of the hospital as an institution. However, if a hospital does not have an organized governing body, the persons legally responsible for the conduct of the hospital carry out the functions herein pertaining to the governing body.

(a) *Standard; bylaws.* The governing body has adopted bylaws in accordance with legal requirements. The factors explaining the standard are as follows:

(1) The bylaws are in writing and available to all members of the governing body.

(2) The bylaws:

(i) Stipulate the basis upon which members are selected, their term of office, and their duties and requirements;

(ii) Specify to whom responsibilities for operation and maintenance of the hospital, including evaluation of hospital practices, may be delegated; and the methods established by the governing body for holding such individuals responsible;

(iii) Provide for the designation of necessary officers; their terms of office and their duties, and for the organization of the governing body into essential committees;

(iv) Specify the frequency with which meetings will be held;

(v) Provide for the appointment of members of the medical staff; and

(vi) Provide mechanisms for the formal approval of the organization, bylaw, rules and regulations of the medical staff and its departments in the hospital.

* * * *

(d) *Standard; liaison.* The governing body has established a formal means of liaison with the medical staff by a joint conference committee or other appropriate mechanism. The factors explaining the standard are as follows:

(1) A direct and effective method of communication with the medical staff is established on a formal, regular basis, and is documented in written minutes or reports which are distributed to designated members of the governing body and active medical staff.

(2) Such effective liaison is a responsiblity of the Joint Conference Committee, the Executive Committee, or designated members of the governing body.

(e) *Standard; medical staff.* The governing body appoints members of the medical staff. The factors explaining the standard are as follows:

(1) A formal procedure is established, governed by written rules and regulations, covering the application for medical staff membership and the method of processing applications.

(2) The procedure related to the submission and processing of applications involves the administrator, credentials committee of the medical staff or its counterpart, and the governing body, all functioning on a regular basis.

(3) Selection of physicians and definition of their medical privileges, both for new appointments and reappointments, are based on written, defined criteria.

(4) Actions taken on applications for medical staff appointments by the governing body are put in writing and retained.

(5) Written notification of applicants is made by either the governing body or its designated representative.

(6) Applicants selected for medical staff appointment sign an agreement to abide by the rules, regulations, and bylaws of the hospital.

(7) There is a procedure for appeal and hearing by the governing body or other designated committee if the applicant or medical staff feels the decision is unfair or wrong.

* * * *

§ 405.1023 Condition of participation—Medical staff.

The hospital has a medical staff organized under bylaws approved by the governing body, and responsible to the governing body of the hospital for the quality of all medical care provided patients in the hospital and for the ethical and professional practices of its members.

(a) *Standard; responsibilities toward policies.* The medical staff is responsible for support of medical staff and hospital policies. The factors explaining the standard are as follows:

(1) Medical staff members participate on various staff committees. Committee records verify that committee meetings are attended by the majority of committee members.

(2) There are prescribed enforced disciplinary procedures for infraction of hospital and medical policies.

* * * *

(d) *Standard; staff appointments.* Staff appointments are made by the governing body, taking into account recommendations made by the active staff. The factors explaining the standard are as follows:

(1) The governing body has the legal right to appoint the medical staff and the moral obligation to appoint only those physicians who are judged by their fellows to be of good character and qualified and competent in their respective fields.

(2) Reappointments are made periodically, and recorded in the minutes of the governing body. Reappointment policies provide for a periodic appraisal of each member of the staff, including consideration of his physical and mental capabilities. Recommendations for reappointments are noted either in the credentials committee or medical staff meetings' minutes.

(3) Temporary staff privileges (for example, locum tenens) are granted for a limited period if the physician is otherwise properly qualified for such.

(e) *Standard; staff qualifications.* Members of the staff are qualified legally, professionally, and ethically for the positions to which they are appointed. The factors explaining the standard are as follows:

(1) To select its members and delineate privileges, the hospital medical staff has a system, based on definite workable standards, to evaluate each applicant by its credentials committee (or in small hospitals, committee-of-the-whole) which makes recom-

mendations to the medical staff and to the governing body.

(2) Privileges are extended to duly licensed qualified physicians to practice in the appropriate fields of general practice, internal medicine, surgery, pediatrics, obstetrics, gynecology, and other recognized and accepted fields according to individual qualifications.

(3) Criteria for selection are individual character, competence, training, experience, and judgment.

(4) Under no circumstances is the accordance of staff membership or professional privileges in the hospital dependent solely upon certification, fellowship, or membership in a specialty body or society. All qualified candidates are considered by the credentials committee.

(5) The scope of privileges to be accorded the physician is indicated. The privileges of each staff member are specifically stated or the medical staff defines a classification system. If a system involving classification is used, the scope of the divisions is well defined, and the standards which must be met by the applicant are clearly stated for each category.

(f) *Standard; active staff.* Regardless of any other categories having privileges in the hospital, there is an active staff, properly organized, which performs all the organizational duties pertaining to the medical staff. These include:

(1) Maintenance of the proper quality of all medical care and treatment in the hospital;

(2) Organization of the medical staff, including adoption of rules and regulations for its government (which require the approval of the governing body),

election of its officers or recommendations to the governing body for appointment of the officers, and recommendations to the governing body upon all appointments to the staff and grants of hospital privileges; and

(3) Making other recommendations to the governing body upon matters within the purview of the medical staff.

* * * *

(l) *Standard; credentials committee.* The credentials committee (or its equivalent) reviews applications for appointment and reappointment to all categories of the staff. It delineates the privileges to be extended to the applicant and makes appropriate recommendations to the governing body according to the procedure outlined in the hospital's medical staff bylaws. The factors explaining the standard are as follows:

(1) The committee makes recommendations for initial appointment, hospital privileges, promotions, and demotions.

(2) The committee is advisory and investigative and makes recommendations only. It is not given disciplinary or punitive powers.

(m) *Standard; joint conference committee.* The joint conference committee (or its equivalent) is a medico-administrative advisory committee and the official means of liaison among the medical staff, the governing body, and the administrator. In the absence of a joint conference committee, a formal means of liaison between the governing body and medical staff is established. The factors explaining the standard are as follows:

(1) A formal means of liaison exists even where there is medical staff representation on the governing body.

(2) The committee meets at least four times per year and maintains a permanent record of its minutes.

(3) Purposes of the committee include:

(i) Communications to keep the governing body, medical staff and administration cognizant of pertinent actions taken or contemplated by one or the other;

(ii) Consideration of plans for growth; and

(iii) Consideration of issues affecting medical care which arise in the operation and affairs of the hospital.

* * * *

APPENDIX H

JOINT COMMISSION ON ACCREDITATION OF HOSPITALS GOVERNING BODY AND MEDICAL STAFF STANDARDS

Governing Body

Standard I

An organized governing body, or designated persons so functioning, is responsible for establishing policy, maintaining quality patient care, and providing for institutional management and planning.

Required Characteristics

A. The governing body adopts bylaws in accordance with its legal accountability and its responsibility to the patient population served.

B. The bylaws specify at least the following:

1. The role and purpose of the hospital;

2. The duties and responsibilities of the governing body;

* * * *

6. The requirement for the establishment of a medical staff;

* * * *

D. The medical staff has the right of representation (through attendance and voice), by one or more medical staff members selected by the medical staff, at meetings of the governing body.

E. There is a systematic and effective mechanism for communication between members of the governing body, the administration, and the medical staff.

* * * *

K. The governing body requires the medical staff to make recommendations concerning medical staff appointments, reappointments, termination of appointments, and the granting or revision of clinical privileges.

1. Any differences are resolved within a reasonable period of time by the governing body and the medical staff.

2. The governing body acts on the recommendations.

L. The governing body establishes policies to assure the following:

1. Only a member of the medical staff with admitting privileges admits patients to the hospital;

2. Only an appropriately licensed practitioner with clinical privileges is directly responsible for a patient's diagnosis and treatment within the area of his privileges;

3. Each patient's general medical condition is the responsibility of a physician member of the medical staff;

4. Each patient admitted to the hospital receives a baseline history and physical examination conducted by a physician who is either a member of, or approved by, the medical staff;

* * * *

N. The governing body requires the medical staff and staffs of the departments/services to implement and report on the activities and mechanisms for monitoring and evaluating the quality of patient care, for identifying

and resolving problems, and for identifying opportunities to improve patient care.

1. The governing body, through the chief executive officer, supports these activities and mechanisms.

O. The governing body holds the medical staff responsible for the development, adoption, and periodic review of medical staff bylaws and rules and regulations which are consistent with hospital policy and with any applicable legal or other requirements.

1. Medical staff bylaws and rules and regulations are subject to, and effective upon, approval by the governing body; approval is not unreasonably withheld.

* * * *

Medical Staff

Standard I

There is a single organized medical staff that has overall responsibility for the quality of the professional services provided by individuals with clinical privileges,* as well as the responsibility of accounting therefor to the governing body. There is a mechanism to assure that all individuals with clinical privileges provide services within the scope of individual clinical privileges granted.

Required Characteristics

A. The medical staff has the following characteristics:

1. It includes fully licensed physicians and may include other licensed individuals permitted by law and by the hospital to provide patient care services independently† in the hospital.

2. All its members have delineated clinical privileges that allow them to provide patient care services independently within the scope of their clinical privileges.

---

* **clinical privileges** Permission to provide medical or other patient care services in the granting institution, within well-defined limits, based on the individual's professional license and his experience, competence, ability, and judgment.

† **individual permitted to provide patient care services independently** Any individual who is permitted by law and who is also permitted by the hospital to provide patient care services without direction or supervision, within the scope of his license and in accordance with individually granted clinical privileges. Clinical privileges are based on criteria established by the hospital.

3. All members of the medical staff, and all others with individual clinical privileges are subject to medical staff and departmental bylaws and rules and regulations and are subject to review as part of the hospital quality assurance program.

B. Appointment to the medical staff is made through a hospital-specific mechanism that is approved and implemented by the medical staff and the governing body; is fully documented in the medical staff bylaws, rules and regulations, and policies; and is described to each applicant. The mechanism provides for, but need not be limited to, the following:

1. Medical staff membership is granted by the governing body in accordance with the bylaws, rules and regulations, and policies of the medical staff and of the hospital. Each applicant for membership is oriented to these bylaws, rules and regulations, and policies and agrees in writing that his activities as a member of the medical staff will be bound by them.

2. Professional criteria specified in the medical staff bylaws and uniformly applied to all applicants or medical staff members constitute the basis for granting initial or continuing staff membership.

a) The criteria are designed to assure the medical staff and governing body that patients will receive quality care.

b) The criteria pertain to, at the least, evidence of current licensure, relevant training and/or experience, current competence, and health status.

c) The criteria may also pertain to other reasonable qualifications, such as

(1) the ability of the hospital to provide adequate facilities and supportive services for the applicant and his patients;

(2) patient care needs for additional staff members with the applicant's skill and training;

(3) current evidence of adequate professional liability insurance; and

(4) the geographic location of the applicant.

d) Sex, race, creed, or national origin are not used in making decisions regarding medical staff membership.

* * * *

5. Peer recommendations are part of the basis for the development of recommendations for medical staff membership.

6. A structured procedure is used for the expeditious processing of applications for appointment.

a) Applications are acted on within a reasonable period of time, as specified in the governing body or the medical staff bylaws.

* * * *

8. The governing body makes the final decision on each application for appointment within a reasonable period of time, as specified in the governing body or the medical staff bylaws.

9. There is a mechanism for appropriate action, including a fair hearing, when the review of credentials and the recommendations regarding initial appointment are adverse to the applicant.

a) This mechanism is defined in the governing body or the medical staff bylaws.

* * * *

Standard II

The medical staff develops and adopts bylaws and rules and regulations to establish a framework for medical staff activities and accountability to the governing body.

Required Characteristics

A. The bylaws and the rules and regulations adopted by the medical staff are subject to governing body approval.

B. The bylaws and the rules and regulations of the medical staff create a framework within which medical staff members can act with a reasonable degree of freedom and confidence.

* * * *

D. Medical staff bylaws include provisions for at least the following:

* * * *

2. Fair-hearing and appellate review mechanisms, which may differ for medical staff members and other individuals holding clinical privileges and for applicants for such membership or privileges.

3. Mechanisms for corrective action, including indications and procedures for automatic and summary suspension of an individual's medical staff membership and/or clinical privileges.

* * * *

6. A mechanism designed to assure effective communication among the medical staff, hospital administration, and governing body.

* * * *

Appendix H

Standard III

The medical staff is organized to accomplish its required functions.

Required Characteristics

* * * *

E. There is an executive committee of the medical staff whose members are selected by the medical staff or appointed in accordance with governing body bylaws.

* * * *

2. The executive committee is responsible for making recommendations directly to the governing body for its approval. Such recommendations pertain to, at the least,

a) the structure of the medical staff;

b) the mechanism used to review credentials and to delineate individual clinical privileges;

c) recommendations of individuals for medical staff membership;

d) recommendations for delineated clinical privileges for each eligible individual;

e) the organization of the quality assurance activities of the medical staff as well as the mechanism used to conduct, evaluate, and revise such activites;

f) the mechanism by which membership on the medical staff may be terminated; and

g) the mechanism for fair-hearing procedures.

* * * *

Standard V

A process for reappointment to the medical staff and reappraisal of clinical privileges is described in the medical staff bylaws and rules and regulations and is implemented by the medical staff.

Required Characteristics

A. The mechanism for reappointment to the medical staff and/or reappraisal and renewal of clinical privileges is

1. hospital-specific;

2. approved by the governing body; and

3. described to each applicant seeking reappointment or the renewal of clinical privileges.

B. Reappointment to the medical staff and/or the granting of delineated clinical privileges is for an interval specified in the medical staff bylaws.

1. The interval is not longer than two years.

C. Reappointment and/or the renewal or revision of clinical privileges is based on a reappraisal of the individual at the time of reappointment.

1. The reappraisal includes information concerning the individual's current licensure, health status, professional performance, judgment, and clinical/technical skills, as indicated by the results of quality assurance activities and other reasonable indicators of continuing qualifications.

2. The bylaws, rules and regulations, and policies of the medical staff and of the governing body indicate that the applicant for reappointment and/or renewal of clinical privileges is required to submit any reasonable evidence of current health status that

may be requested by the executive committee of the medical staff.

D. Peer recommendations are part of the basis for the development of recommendations for continued membership on the medical staff and/or for the delineation of individual clinical privileges.

E. Departmental and/or major clinical service recommendations are part of the basis for the development of recommendations for continued membership on the medical staff and/or for the delineation of individual clinical privileges.

* * * *

H. The governing body is responsible for the final decision, based on medical staff recommendations, regarding an individual's reappointment and/or renewal or revision of individual clinical privileges.

* * * *

APPENDIX I

PENNSYLVANIA HEALTH REGULATIONS

PART IV. HEALTH FACILITIES

* * * *

Authority

The provisions of this Part IV issued under AC §§ 2101 — 3002 (P.L. 177, No. 175) (71 P.S. §§ 531 — 732); Act of June 13, 1967 (P.L. 31, No. 21), Arts. IX and X (62 P.S. §§ 901 — 1059); and Reorganization Plan No. 3 of 1975, unless otherwise noted.

Source

The provisions of this Part IV adopted August 29, 1975, 5 Pa.B. 2233, amended February 10, 1977, 7 Pa.B. 437, unless otherwise noted.

Subpart A. GENERAL AND SPECIAL HOSPITALS

* * * *

Notes of Decisions

The legislature has authorized the Department of Health to promulgate its rules and regulations concerning hospitals. *Hospital Association of Pennsylvania v. MacLeod*, 487 Pa. 516, 524, 410 A.2d 731, 735 (1980).

Appendix I

CHAPTER 101. GENERAL INFORMATION

GENERAL PROVISIONS

* * * *

§ 101.4. Definitions.

The following words and terms, when used in this subpart, shall have the following meanings, unless the context clearly indicates otherwise:

* * * *

Hospital — A facility having an organized medical staff and providing equipment and services primarily for inpatient care to persons who require definitive diagnosis or treatment, or both, for injury, illness, pregnancy, or other disability.

* * * *

Organized medical staff — A formal organization of physicians, and dentists with the delegated responsibility and authority to maintain proper standards for medical care.

* * * *

HOSPITAL REQUIREMENTS

§ 101.31. Hospital requirements.

A hospital shall have all of the following:

(1) An organized governing body.

* * * *

(3) An organized medical staff.

* * * *

Appendix I

CONTINUING SURVEILLANCE

§ 101.81. Unannounced surveys.

Whenever the Department has received any complaint or has other reasonable grounds to believe that a deficiency exists, the Department may without notice to the hospital, investigate, inspect, or survey any service, facility, or portion of the hospital to which the alleged deficiency relates.

* * * *

ADDITIONAL REMEDIES

§ 101.141. Principle.

The Department will enforce this subpart and its recommendations and directives through all lawful and appropriate means.

§ 101.142. Withhold State funds.

After proper notice and the opportunity for a hearing, the Department may withhold, in whole or in part, any and all State funds available to any hospital which:

(1) fails to comply with a compliance directive without having timely requested a hearing; or

(2) operates without a valid license.

Authority

The provisions of this § 101.142 issued under act of April 9, 1929 (P.L. 177, No. 175), § 2102(g) (71 P.S. § 532(g)); and Act of July 19, 1979 (P.L. 130, No. 48), § 803, added July 12, 1980 (P.L. 655, No. 136) (35 P.S. § 480.803).

* * * *

Appendix I

CHAPTER 103. GOVERNANCE AND MANAGEMENT

* * * *

Subchapter A. GOVERNING PROCESS GENERAL PROVISIONS

* * * *

§ 103.1. Principle.

There shall be an organized governing body or designated person vested with ownership who shall assume the full legal authority and responsibility for the conduct of the hospital.

* * * *

§ 103.3. Governing body bylaws.

The governing body shall adopt bylaws in accordance with all requirements contained in this subpart and in accordance with the community responsibility of the hospital. As a minimum, the bylaws shall do the following:

* * * *

(5) Describe the authority delegated to the chief executive officer and to the medical staff. No assignment, referral, or delegation of authority by the governing body shall relieve the governing body of its responsibility for the conduct of the hospital. The governing body shall retain the right to rescind any such delegation.

* * * *

(7) Require the governing body to review and approve the bylaws of the medical staff organization.

(8) Establish a procedure for processing and evaluating the applications for medical staff membership and for the granting of clinical privileges.

* * * *

§ 103.4. Functions.

The governing body, with technical assistance and advice from the hospital staff, shall do the following:

(1) Provide appropriate physical resources and personnel required to meet the needs of the patients and participate in planning to meet the health needs of the patients and health needs of the community. A quality control mechanism should be established which includes as an integral part thereof a risk management component and an infection control program.

* * * *

(6) Utilize the advice of the medical staff in granting and defining the scope of clinical privileges to individuals. When the governing body does not concur in the medical staff recommendation regarding the clinical privileges of an individual, there should be a review of the recommendation by a joint committee of the medical staff and governing body before a final decision is reached by the governing body.

(7) Require that applicants be informed of the disposition of their application for medical staff membership or clinical privileges, or both, within a reasonable period of time after their application has been submitted.

(8) Require that the medical staff bylaws, rules, and regulations be approved by the governing body. Such approval shall not be withheld unreasonably.

(9) Delegate to the medical staff the authority to evaluate the professional competence of staff members and applicants for staff privileges and hold the medical staff responsible for recommending initial staff appointments, reappointments, and assignments or curtailments of privileges.

* * * *

(11) Maintain effective communication with the medical staff. This may be established, *inter alia*, through:

(i) a joint conference committee;

(ii) service by the president of the medical staff as a member of the governing body with or without a vote; or

(iii) appointment of individual medical staff members to governing body committees.

(12) Require the medical staff to establish controls that are designed to ensure the achievement and maintenance of high standards of ethical professional practices.

(13) Ensure that the medical staff is provided with the necessary administrative staff to facilitate utilization review and infection control within the hospital and to support any other medical staff functions required by this subpart or by the hospital bylaws.

(14) Require that each member of the medical staff act in an ethical manner.

* * * *

CHAPTER 107. MEDICAL STAFF

* * * *

GENERAL PROVISIONS

§ 107.1. Principle.

There shall be an organized medical staff which is accountable to the governing body and which has responsibility for the quality of all medical care provided to patients and for the ethical conduct and professional practice of its members.

§ 107.2. Medical staff membership.

The medical staff shall be limited to physicians and dentists who have made application in accordance with the bylaws, rules, and regulations of the medical staff and with the bylaws of the hospital. Each member of the medical staff shall be qualified for membership and the exercise of clinical privileges granted to him. The medical staff must define in bylaws the requirements for admission to staff membership and for the delineation and retention of clinical privileges. The governing body of the hospital, after considering the recommendations of the medical staff, may grant clinical privileges to other qualified, licensed practitioners in accordance with their training, experience, and demonstrated competence and judgment. Members of the medical staff and those granted clinical privileges shall currently hold licenses to practice in this Commonwealth.

§ 107.3. Requirements for membership and privileges.

(a) In order to receive favorable recommendation for appointment or reappointment, members of the medical staff must always act in a manner consistent with the highest ethical standards and levels of professional competence.

(b) Privileges granted shall be commensurate with an individual's qualifications, experience, and present capabilities.

(c) No applicant shall be denied medical staff privileges on the basis of sex, race, creed, color, or national origin or on the basis of any other criterion lacking professional or ethical justification, including association with a prepaid group practice.

§ 107.4 Medical staff status.

(a) Every hospital shall have an active medical staff to deliver the preponderance of medical services within the hospital. The active medical staff shall be responsible for its own organization and administration and should perform all significant duties pertaining thereto. Every member of the active medical staff shall be eligible to vote at staff meetings and to hold office.

* * * *

§ 107.5. Membership appointment and reappointment.

(a) The governing body shall affirm or refuse the appointment of any physician or dentist to the medical staff or the granting of clinical privileges to any practitioner after considering the recommendation of the active medical staff in accordance with the procedure established pursuant to subsection (b).

(b) Formal application for membership and for granting of clinical privileges shall follow established procedures set forth in the bylaws, rules, and regulations of the medical staff. These procedures shall provide the following:

(1) A written record of the application, which shall include the scope of privileges sought and granted.

(2) A review, summarized on record with appropriate documentation, of the qualifications of the applicant.

(3) A reasoned statement, in writing, by the medical staff recommending or declining to recommend the applicant.

(4) Written notice to the applicant of the recommendation of the medical staff, including notice of an applicant's right to a hearing and reexamination before the medical staff or the governing body, or both.

(5) A review by a joint committee of the active medical staff and the governing body in cases where the governing body does not concur in the medical staff's recommendation regarding the granting or refusing of clinical privileges. Such review shall occur prior to the rendering of a final decision by the governing body.

(c) Reappointment shall be required of every member of the medical staff at regular intervals no longer than every two years.

(d) No appointment or reappointment to the medical staff shall be denied on the basis of sex, race, creed, color, or national origin.

* * * *

MEDICAL STAFF BYLAWS, RULES, AND REGULATIONS

§ 107.11. Principle.

The medical staff shall develop and adopt, subject to the approval of the governing body, a set of bylaws, rules, and regulations.

§ 107.12. Content of bylaws, rules, and regulations.

The medical staff bylaws, rules, and regulations shall provide for at least the following:

* * * *

(2) *Staff privileges.* Qualifications for staff membership shall be specified, as shall procedures for admission, retention, assignment, and reduction or withdrawal of privileges. This delineation of privileges shall also address specifically the privileges of house staff and house staff officers.

(3) *Credentials review.* The bylaws shall establish procedures and standards whereby staff credentials will be reviewed.

(4) *Appeals.* The bylaws shall provide for the establishment of fair hearing and appellate review mechanisms, which will be available if requested by the practitioner in connection with medical staff recommendations for denial of staff appointments, as well as the denial of reappointments, or the curtailment, suspension, or revocation of privileges. It is recognized that the mechanism for individuals applying for initial medical staff appointments or privileges may differ from that which is applicable to medical staff members.

* * * *

(13) *Liaison with governing body.* A mechanism shall be provided by which the medical staff shall consult with and report to the governing body. Because the governing body of the hospital, acting through the chief executive officer, has the overall responsibility for the conduct of the hospital and because the medical staff has the overall responsibility for the provision of medical care to patients, there

shall be full communication between the two bodies. Both shall be adequately informed regarding hospital activities. Further, representatives of the medical staff shall participate in hospital deliberations which affect the discharge of medical staff responsibilities.

* * * *

§ 107.26. Additional committees.

(a) There shall be such additional committees as are necessary to organize and conduct the operations of the medical staff. All rules and proceedings of any additional committees shall be permanently recorded and kept available for inspections by members of the medical staff and the governing body.

(b) The following additional committees are mandatory:

(1) A credentials committee which shall make recommendations for staff appointments and reappointments, promotions, demotions, and clinical privileges. The credentials committee shall be advisory and investigative and shall report to the executive committee of the medical staff.

* * * *

SUMMARY OF STATE REGULATION OF HOSPITAL MEDICAL STAFFS

State Statutory/regulatory citation	Medical staffs mandated?	All physicians with staff privileges (who admit and/or treat patients) required to belong to medical staff?	Medical staff participation in credentialing mandated?	Board has supreme authority; medical staffs only advise?	Osteopaths authorized to have staff privileges (i.e. non-discrimination)?
Alabama Ala. Dep't of Health Rules, Reg's & Standards §§ 102.11, 102.20, 302.2, 401.1, 501.1-502.5	Yes	No	Yes	Yes	Unclear
Alaska Alaska Admin. Code tit. 7, § 12.110 (Jan. 1984)	Yes	Yes	Yes	Yes	Unclear
Arizona Ariz. Admin. Comp. R. 9-10-113, 9-10-214 (1982)	Yes	Yes	Yes	Yes	Yes†
Arkansas Ark. Rules & Reg's for Hosp's ch. II, pt. 2, §§ I, II (1979)	Yes	No†	Yes	Yes	Unclear

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State Statutory/regulatory citation	Medical staffs mandated?	All physicians with staff privileges (who admit and/or treat patients) required to belong to medical staff?	Medical staff participation in credentialing mandated?	Board has supreme authority; medical staffs only advise?	Osteopaths authorized to have staff privileges (i.e. non-discrimination)?
California Cal. Health & Safety Code § 1316 (West 1979); Cal. Admin. Code tit. 22, R. 70703 (1983)	Yes	No†	Yes	Yes†	Yes
Colorado Colo. Rev. Stat. § 25-3-103.5 (Supp. 1984); 6 Colo. Admin. Code chs. I, IV	Yes	Yes	Yes	Yes	Yes
Connecticut Conn. Agencies Regs. § 19-13-D3	Yes	No†	Yes	Yes	Unclear
Delaware Del. Bd. of Health Rules & Reg's Governing the Licensure of Hosp's § 50.301	Yes*	Yes*	Yes*	Yes*	Yes*†
District of Columbia D.C. Health Reg's §§ 8-7:107 to 8-7:108	Yes	No†	Unclear	Yes	Unclear

State Statutory/regulatory citation	Medical staffs mandated?	All physicians with staff privileges (who admit and/or treat patients) required to belong to medical staff?	Medical staff participation in credentialing mandated?	Board has supreme authority; medical staffs only advise?	Osteopaths authorized to have staff privilieges (i.e. non-discrimination)?
Florida Fla. Stat. Ann. § 395.011 (West Supp. 1984); Fla. Admin. Code R. 10D-28.52, 10D-28.56 to 10D-28.58 (1984)	Yes	Yes	Yes	Yes	Yes
Georgia IV Ga. Admin. Comp. ch. 290-5-6 (1984)	Yes	Yes	Yes*†	Yes	Yes*†
Hawaii Haw. Admin. Reg's (Dep't of Health) §§ 11-93-2, 11-93-14, 11-93-23	Yes	Yes	Yes	Yes	Yes†
Idaho Idaho Code § 54-1803 (1979); Rules, Reg's & Minimum Standards for Hosp's in Idaho §§ I.P., I.R., III.A.4.	Yes	Yes	Unclear	Yes†	Yes†

(Continued on next page)

State Statutory/regulatory citation	Medical staffs mandated?	All physicians with staff privileges (who admit and/or treat patients) required to belong to medical staff?	Medical staff participation in credentialing mandated?	Board has supreme authority; medical staffs only advise?	Osteopaths authorized to have staff privileges (i.e. non-discrimination)?
Illinois Ill. Hosp. Licensing Req's §§ 1-5.1, 2-1.1, 2-1.6, 3-1.1, 3-1.2, 3-2	Yes	Yes	Yes	Yes	Yes
Indiana Ind. Admin. Code tit. 410, R. 15-1-1, 15-1-5, 15-1-7, 15-1-10, 16-10-1-6.5 (Burns 1979)	Yes	Yes	Yes	Yes	Yes†
Iowa Iowa Code Ann. §§ 135.1, 347.18 (West 1972 & 1983); Iowa Admin. Code §§ 470-51.1, 470-51.4 (1983)	Yes	Unclear	Unclear	Yes	Yes†
Kansas Kan. Stat. Ann. §§ 14-612, 19-1813 (1975 & 1981); Kan. Admin. Reg's §§ 28-34-1, 28-34-5 to 28-34-6 (1978)	Yes	Unclear	Yes	Yes	Yes

State Statutory/regulatory citation	Medical staffs mandated?	All physicians with staff privileges (who admit and/or treat patients) required to belong to medical staff?	Medical staff participation in credentialing mandated?	Board has supreme authority; medical staffs only advise?	Osteopaths authorized to have staff privileges (i.e. non-discrimination)?
Kentucky 5 Ky. Admin. Reg's §§ 20:012, 20:016 (1982)	Yes	Yes	Yes	Yes	Unclear
Louisiana 37 La. Rev. Stat. Ann. § 1301 (West 1974 & Supp. 1984); La. Rules, Reg's & Minimum Standards Governing Hosp's ch. I, § 13, ch. II, §§ 1-4	Yes*	Yes	Yes*	Yes*	Yes
Maine Me. Reg's for Licensure of Gen'l & Specialty Hosp's chs. VI, IX	Yes	No	Yes	Yes	Unclear
Maryland Md. Health-General Code Ann. § 1-101(h) (1982); Md. Health Occupations Code Ann. § 14-101(h) (Supp. 1984); Md. Admin. Code tit. 10, §§ 10.07.01-10.07.10 (1984)	Yes	Yes	Yes*	Yes*	Yes*†

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State Statutory/regulatory citation	Medical staffs mandated?	All physicians with staff privileges (who admit and/or treat patients) required to belong to medical staff?	Medical staff participation in credentialing mandated?	Board has supreme authority; medical staffs only advise?	Osteopaths authorized to have staff privileges (i.e. non-discrimination)?
Massachusetts Mass. Gen. Laws Ann. ch. 111, § 51C (West 1983); Mass. Admin. Code tit. 105, § 130.200 (1984)	Yes*	Yes*	Yes*	Yes*	Yes
Michigan Mich. Comp. Laws Ann. § 14.15 (20152) (Supp. 1984); Mich. Minimum Standards for Hosp's R. 325.1021.1.4, 325.1027.7.1	Yes*	No†	Yes*	Yes*	Yes
Minnesota Minn. Stat. Ann. § 145.61 (West Supp. 1984); 9 Minn. Code Agency R. MHD77 (1980)	Yes	Yes	Yes*	Yes	Yes*†
Mississippi Minimum Standards of Operation for Miss. Hosp's chs. 3, 4, 5	Yes	Yes	Yes	Yes	Unclear

State Statutory/regulatory citation	Medical staffs mandated?	All physicians with staff privileges (who admit and/or treat patients) required to belong to medical staff?	Medical staff participation in credentialing mandated?	Board has supreme authority; medical staffs only advise?	Osteopaths authorized to have staff privileges (i.e. non-discrimination)?
Missouri 13 Mo. Code of State Reg's §§ 50-20.011, 50-20.021 (1982)	Yes	Unclear	Yes	Yes	Yes†
Montana Mont. Admin. R. 16.32.320 (1980)	Yes*	Yes*	Yes*	Yes*	Yes*†
Nebraska 14 Neb. Admin. (Dep't of Health) R. 30 (1979)	Yes	Yes†	Yes	Yes	Yes†
Nevada Nev. Rev. Stat. §§ 450.430 to 450.450 (1983); Nev. Operational Rules & Reg's for Health Facilities (Bd. of Health) pt. III, ch. I, §§ I, II!	Yes	No†	Yes	Yes	Yes
New Hampshire N.H. Admin. Code (Rules & Reg's for Operation of Hosp's) § He-P 802.01	Yes	Unclear	Yes†	Yes	Unclear

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New Jersey N.J. Stat. Ann. § 45:9-5.1 (West Supp. 1984); N.J. Admin. Code §§ 8:43B-2.1 to 8:43B-2.2, 8:43B-6.1 to 8:43B-6.4 (1984)	Yes	Unclear	Yes	Yes	Yes†
New Mexico N.M. Licensing Reg's for Hosp's pt. 2, div. II, § W	Yes†	No†	Unclear	Unclear	Unclear
New York N.Y. Pub. Health Law § 2801-b (McKinney 1977); N.Y. Admin. Code tit. 10, §§ 405.2, 405.1021, 405.1023 (1984)	Yes	No†	Yes	Yes	Yes
North Carolina N.C. Laws, Reg's & Procedures Applying to Licensing of Hosp's §§ .0301, .0400	Yes	Unclear	Yes	Yes	Yes*†

State Statutory/regulatory citation	Medical staffs mandated?	All physicians with staff privileges (who admit and/or treat patients) required to belong to medical staff?	Medical staff participation in credentialing mandated?	Board has supreme authority; medical staffs only advise?	Osteopaths authorized to have staff privileges (i.e. non-discrimination)?
North Dakota N.D. Cent. Code § 43-17-01 (1978); N.D. Admin. Code §§ 33-07-01-01, 33-07-01-02, 33-07-01-04, 33-07-01-12 (1978)	Yes	No	Unclear	Yes	Yes†
Ohio Ohio Rev. Code Ann. § 3701.351 (Page Supp. 1984); Ohio Admin. Code §§ 3701-11-01, 3701-11-03 (1983)	Yes	Unclear	Yes†	Yes	Yes
Oklahoma Okla. Stat. Ann. tit. 63, § 1-707a (West 1984); Okla. Standards & Reg's for Licensure of Hosp's pt. II	Unclear	No†	Unclear	Yes†	Yes†

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State Statutory/regulatory citation	Medical staffs mandated?	All physicians with staff privileges (who admit and/or treat patients) required to belong to medical staff?	Medical staff participation in credentialing mandated?	Board has supreme authority; medical staffs only advise?	Osteopaths authorized to have staff privileges (i.e. non-discrimination)?
Oregon Or. Rev. Stat. §§ 441.055, 677.010 (1981); II Or. Admin. R. 333-23-114, 333-23-125, 333-23-126 (1981)	Yes	Unclear	Yes*	Yes	Yes†
Pennsylvania 28 Pa. Code §§ 101.31, 101.4, 103.4, 107.1-107.5, 107.12 (1984)	Yes	Yes†	Yes	Yes	Yes†
Rhode Island R.I. Gen. Laws § 23-17-23 (1979)	Yes*	Yes*	Yes*	Yes*	Yes*†
South Carolina S.C. Code Ann. § 44-7-770, 44-7-1060 (Law. Co-op. 1977); S.C. Code Ann. R. 61-16, §§ 101, 202, 301, 302, 307 (Law. Co-op. 1982 & Supp. 1983)	Yes	No	Unclear	Yes	Yes

State Statutory/regulatory citation	Medical staffs mandated?	All physicians with staff privileges (who admit and/or treat patients) required to belong to medical staff?	Medical staff participation in credentialing mandated?	Board has supreme authority; medical staffs only advise?	Osteopaths authorized to have staff privileges (i.e. non-discrimination)?
South Dakota S.D. Codified Laws Ann. § 34-8-8.1 (Supp. 1984); S.D. Admin. R. chs. 44:04:01, 44:04:04 to 44:04:05 (1980)	Yes	No	Yes	Yes	Yes†
Tennessee Tenn. Admin. Comp. R. 1200-8-1-.01, 1200-8-1-.02, 1200-8-3-.01, 1200-8-3-.02	Yes	No	Yes†	Yes	Yes†
Texas Texas Stat. Ann. art. 4437f (Vernon 1976); Texas Hosp'l Licensing Standards (Dep't of Health Resources) pts. II.A., II.B.	Yes	Yes	Yes†	Yes†	Unclear
Utah Utah Code Ann. § 26-15-54 (1976); 3 Utah Admin. R. A28-05-1	Yes	No	Yes	Yes	Yes†

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Vermont Vt. Stat. Ann. tit. 18, § 1905 (1968); Vt. Hosp'l Licensing Procedure (Dep't of Health) § 3-944	Yes	No	Unclear	Unclear	Unclear
Virginia Va. Code §§ 32.1-134.1, 54-309 (1979 & 1982); Va. Rules & Reg's for Licensure of Hosp's §§ 102.0, 105.0	Yes	Unclear	Yes	Yes	Yes†
Washington 4 Wash. Admin. Code R. 248-18-001, 248-18-030 (1977)	Yes	Yes	Yes*	Yes*	Yes*†
West Virginia W. Va. Reg's & Law for Licensing Hosp's §§ 300.1, 301.1, 1001.1	Yes	Yes	Yes†	Yes	Unclear

State Statutory/regulatory citation	Medical staffs mandated?	All physicians with staff privileges (who admit and/or treat patients) required to belong to medical staff?	Medical staff participation in credentialing mandated?	Board has supreme authority; medical staffs only advise?	Osteopaths authorized to have staff privileges (i.e. non-discrimination)?
Wisconsin 3 Wis. Admin. Code §§ 24.02, 24.04 [Health & Social Services] (1982)	Yes	Unclear	Yes	Yes	Yes†
Wyoming Wyo. Stat. Ann. § 35-2-113 (Supp. 1984); Wyo. Standards, Rules & Reg's for Hosp's ch. I	Yes	Unclear	Yes	Yes	Yes†

* Through recommendation or requirement that Joint Commission on Accreditation of Hospitals Standards (*supra* Appendix H) or federal Medicare Conditions of Participation for Hospitals (*supra* Appendix G) be adopted.

† By implication from the structure of the regulatory requirements.

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84-

No. 1187

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE MEDICAL AND DENTAL STAFF
OF YORK HOSPITAL,

Petitioner

v.

MALCOLM D. WEISS, D.O.,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE CASE

Within the York, Pennsylvania Medical Service Area ("MSA") there are only two providers of inpatient hospital services. One is York Hospital, a powerful institution with over 450 beds, 2,500 employees, a market share exceeding 80 percent of the hospitalization provided in the York MSA and exclusive control over highly complex tertiary care services essential in the treatment of a wide variety of disorders. (PA-9-10; 3496a-3470a; 3862a; 4963a-4964a).[1]

York Hospital awards "staff privileges" by which physicians become members of the Hospital Medical Staff and are licensed to admit and treat patients at the Hospital. (PA-15-16). Without such privileges, a physician cannot effectively admit, follow, and treat patients at York Hospital. (PA-11; 3802a-3803a; 4979a; 5262a-5265a).

The members of York's Medical Staff are not employees of the Hospital. (3801a-3802a; 4140a-4147a; 4979a; 5262a-5265a; 5960a; PA-58-59). Instead, they are physicians "in private practice in the community." (3801a). From an economic standpoint, their independence from the Hospital and one another is complete. According to the Hosptial's Vice President of Medical Affairs, the members of its Staff are "independent of any financial arrangement with the Hospital." (3801a-4140a-4141a). The fees charged by the Hospital and the members of the Medical Staff are independently determined and separately collected. (PA-58-59; 3801a-3802a; 4140a-4147a; 4979a; 5262a-5205a; 5960a). Capital is not pooled. (*Ibid*). Profit and loss is not shared. (*Ibid*). With respect to granting qualified physicians access to the Hospital, the economic interests of all the incumbent members of the Medical Staff, regardless of specialty, is to exclude, while the economic interest of the Hospital is to admit. (3870a-3878a; 3948a-3963a). Yet, because of York Hospital's dependence on the members of its

1. References to "PA" are to the pages of the Appendix to the Petition for a Writ of Certiorari. References to "RA" are to Respondent's Appendix to this Brief in Opposition to the Petition for a Writ of Certiotari. Four digit references followed by a small letter "a" (e.g., "3469a") are to the Appendix on appeal filed in the United States Court of Appeals for the Third Circuit.

Medical Staff for business, it has a strong financial incentive to acquiesce in the exclusionary propensities of its Medical Staff. See: Dolan & Ralston, "Hospital Admitting Privileges and the Sherman Act," (hereinafter "Dolan & Ralston"), 18 *Houston L. Rev.* 707, 753 (1981).

Recognizing their desire for a "self-governed Medical and Dental Staff" the physicians at York Hospital adopted Bylaws organizing themselves as an unincorporated association, the Petitioner here. (3802a-3803a; 5960a). The York Hospital Board of Directors delegated all decision making responsibility for determining the criteria for staff privileges and compliance with those criteria to the petitioner and retained the very limited responsibility of ascertaining only whether the Medical Staff had afforded an applicant procedural due process in considering his application. (4150a-4152a; 4777a-4778a; 4779a-4780a; 3821a; 4501a-4502a).

Although separately schooled, both osteopathic physicians ("D.O.s") and allopathic physicians ("M.D.s") are equally qualified for state licensure to practice medicine and surgery within the Commonwealth of Pennsylvania. *See*, 63 Purdon Stat. Ann. §271.2 *et seq*. & §421.2 *et seq*. At trial, both York Hospital and its Medical Staff admitted that there was "no difference whatsoever" in the training, background, competence, qualifications, and references for the two groups. (PA-5 & PA-6; 3806a-3809a; 4014a-4015a). The York Medical Staff conceded that admission of osteopathic physicians to the Medical Staff of York Hospital "would in no way adversely affect the standard of care now provided at York Hospital." (4025a) Nevertheless, both the Corporate Charter of York Hospital and the Bylaws of its Medical Staff expressly barred D.O.s from practicing at York Hospital.

At the end of 1974, York Hospital changed its Corporate Charter to remove its bar to D.O.s practicing at York Hospital. (PA-12; 3501a). However, since the Medical Staff actually controlled access to staff privileges at the Hospital, osteopaths continued to be barred from admission to the Hospital because of an express provision in the Medical Staff Bylaws. (PA-12; 4501a). Nevertheless, in the Spring of

1976, plaintiff, an osteopathic physician, applied for staff privileges at York Hospital. (PA-12; 3987a; 3943a). He threatened legal action if the barriers to entry contained in the York Medical Staff Bylaws were not removed. (PA-12; 5952a).

The leaders of the Medical Staff were opposed to permitting osteopathic physicians on the Medical Staff at York Hospital, solely out of loyalty to the economic interests of their breathren. (3872a-3880a; 3953a; 3948a-3950a; 3988a-3996a; 4549a; 5859a; 5950a). Although there was no question about their training or competence, there was fear expressed that allowing D.O.s staff privileges would adversely affect the income of M.D.s by producing competition. (*Ibid.*). Many of the M.D.s at York Hospital had "outright hostility" to permitting osteopathic physicians to join their inner sanctum. (5895a).

The Medical Staff consulted with the Hospital's legal counsel who offered the opinion that they were required to refrain from discriminating against D.O.s. (5951a). However, the Staff "did not feel obliged to do so on the basis of legal counsel's opinion." (*Ibid*). Thus, in direct contravention of what they knew the law to require, a consensus was formed among the physicians on the Medical Staff that their Bylaws should not be amended to allow osteopaths on the Staff of York Hospital absent some assurance that "not that many would be applying," that such an amendment would not affect any "major alignment" in the Medical Staff, and that only "a few" D.O.s would be accepted on the Staff. (4497a-4500a; 4516a-4518a; 4026a; 2084a-1-2805a).

Accordingly, in order to stave off legal attack, the Medical Staff Bylaws were amended in November of 1976 to eliminate the formal barriers to the admission of osteopathic physicians to the York Medical Staff, (3813a; 4495a-4497a), but the change was purely cosmetic. It was accompanied by the informal adoption of discriminatory and medically unjustifiable standards for reviewing the qualifications of osteopaths so as to implement the Staff's plan to accept only a few token D.O.s. (PA-12-13).

Dr. Merle Bacastow, a member of the Medical Staff and Vice President of York Hospital in charge of its medical

affairs, described the criteria applied to granting staff privileges to M.D. applicants:

"Q. Is it a fact, Doctor, that at York Hospital that the procedure applicable to the applications of medical doctors is that if there is adverse information in their file, but they are licensed to practice medicine in the state of Pennsylvania, their application is accepted and the Hospital closely monitors their behavior after acceptance to determine whether there is going to be any problems?

THE WITNESS: Yes." (4519a-4160a)

By reason of this presumptive entitlement to privileges, virtually every M.D. who applied for staff privileges at York Hospital received them. (3818a-3820a). In the ten years preceding the date of the trial, petitioner received over 200 applications for privileges by M.D.s. (PA-13; 3818a-3819a). During this period, the only M.D. to ever be denied privileges was a physician suffering from acute psychosis. (PA-13; 3820a). However, the presumption enjoyed by members of the "M.D. club" at York Hospital did permit the admission of a number of M.D.s who "had serious deficiencies in medical knowledge" and who were "not able to provide total patient care." (PA-13; 4719a-4720a; 5295a-5312a).

The presumptive entitlement to York staff privileges enjoyed by medical doctors was not to be afforded to osteopathic physicians. While "personality deficiencies" were not considered a sufficient basis to exclude a medical doctor from the Staff, such "deficiencies" were considered an acceptable basis on which to foreclose privileges to osteopathic physicians. (PA-13; 3819a-3820a; 4071a-4074a; 4089a-4090a; 4158a-4159a; 5859a; 5899a; 5900a). Moreover, the credentials of osteopathic physicians, including their "personality", were to be subjected to a "strict scrutiny" which included unprecedented "surveys" of the entire medical community for adverse information, rumors and gossip. (PA-13; 4026; 4070a-4074a; 4080a-4081a; 4129; 4160a-4163a; 5899a; 4345a4347). If any difficulties were even suggested by such a survey, the D.O. was to be excluded from the Medical Staff. (*Ibid*).

After the Medical Staff Bylaws were amended, the application of Drs. Weiss was processed. By February of 1977, his file was complete, his credentials were in order and his application had received the required endorsements. (3817a; 4058a-4067a). Routine protocol would have dictated approval by the Medical Staff Executive Committee, the body charged with managing the general affairs of the Medical Staff. (4070a). However, in a dramatic departure from the procedures applied to allopathic applicants, the Executive Committee declined to consider the application and directed an unprecedented survey of the entire medical community to garner adverse information. (4107a-4108a; 4070a; 4080a-4081a; 4089a-4127a; 4129a).

This unprecedented witch hunt succeeded in ferreting out little more than gossip concerning Dr. Weiss' "untasteful" behavior at squash matches. (4071a; 5886a-5887a; 5894a). There were, however, two letters, one from Dr. Worthwein and one from Dr. Kamer, which raised some vague questions concerning Dr. Weiss' professional competence. Yet, the petitioner received reliable information from several sources that Dr. Worthwein's conclusions were unfounded and Dr. Kamer's report was revealed as a malicious lie. (4353a-4355a; 4119a-4122a; 5895a-5896a). Indeed, the unprecedent investigation made pursuant to the Executive Committee's directive revealed that far from being incompetent and unprofessional, Weiss was the best osteopathic physician practicing in the York MSA. As the staff's Family Practice Credentials Committee itself told Dr. Weiss:

> "He was specifically told that almost everybody with whom we spoke acknowledged him to be an intelligent, competent, conscientious physician whose care of his patients in the Hospital was quite competent. He was told that the Chairman of his department suggested that he was probably the best general practitioner." (5895a-5896a).

Nevertheless, the Medical Staff Executive Committee rejected Weiss' application, not on the basis of the Kamer-Worthwein charges, but solely based on the gossip that his personality, as manifested on the squash court and at "cov-

ered dish social affairs," was deficient. (3819a; 5956a-5958a; 4071a; 4880a; 4884a-4885a; 5894a; 5895a).

Defendant relies on the pretrial deposition testimony of Donn Cohen, a lawyer who chaired York Hospital's Board of Directors to support the claim that the Board did not simply accept the Medical Staff's decision, but gave full consideration to the merits of his application and decided, independently, to reject it. Notably, Mr. Cohen did not testify at trial. What the trial record does show is that in connection with Weiss' application the Board followed its policy to simply rubber stamp the staff privilege decisions made by the Staff. (3821a; 4501a-4502a). According to one witness who did testify at trial, Mr. Cohen told the Medical Staff that the Board would "back up" any decision reached by it on Weiss' application. (4433a-4435a). Moreover, the minutes of the relevant Board meeting show that the Board did not give full consideration to Weiss' application but expressly limited its function to that of "an appellate review body." (1690a). They also show that the only decision actually made by the Board concerning Dr. Weiss was contained in a resolution that "Dr. Malcolm Weiss has received due process and has thereby been afforded fair and adequate hearing procedures." (1693a).

The record was uncontroverted that the "denial of privileges to a physician is a serious adverse professional event which is likely to besmirch the professional reputation of such a physician." (PA-101). The York Medical Staff knew that. They knew that the treatment of Weiss' application would receive attention and publicity throughout the York MSA as a harbinger of what osteopaths could expect at the hands of York Hospital. (4054a-4055a; 4172a-5173a). Accordingly, the treatment afforded Weiss "could reasonably be anticipated to cause [other] osteopathic physicians to refrain from applying for staff privileges at York Hospital." (PA-102). Thus, before Weiss instituted suit in the district court in January of 1980, petitioner's policy of discrimination had succeeded in foreclosing access to York Hospital's unique and essential facilities to all but one osteopathic physician.

Dr. Weiss instituted this action on behalf of a class seeking primarily declaratory and injunctive relief. His Complaint alleged that the conduct of York Hospital and its Medical Staff towards osteopathic physicians was a boycott and unlawful under Sections 1 and 2 of the Sherman Act. After several unsuccessful attempts by defendants to procure writs of mandamus and prohibition against District Judge Malcolm Muir, the case was tried before a jury of twelve. (PA-23). At the conclusion of the evidence, the trial court proposed to submit the case to the jury in the form of special verdict questions. Plaintiff contended that a modified per se rule applied in view of the Hospital's market power and the concession that there was no legitimate basis to discriminate between M.D.'s and D.O.s and that a restraint of trade would be made out by a jury finding that there was a conspiracy to deny osteopathic physicians equal access to York Hospital. Defendants contended that a full scale rule of reason approach was required and thus sought the submission of a question to the jury asking whether any conspiracy by defendants "unreasonably restrained trade." Seeking to avoid a retrial the facts, the Court submitted both questions to the jury. In defining the analysis required by them in order to answer the question as to whether any conspiracy by defendants restrained trade under the rule of reason approach, the Court gave, verbatim, the charge requested by the defendants. See: 3410a & 5689a. All told, the trial court submitted 42 Special Verdict Questions with 122 subparts for answer by the jury. (PA-23)

After two days of deliberation, the jury returned a unanimous verdict. Among other things it found that: (1) The conduct of defendants concerning the plaintiff and the plaintiff class occurred in and had a not insubstantial effect on interstate commerce; (2) Plaintiff would have received staff privileges at York Hospital but for the fact that he was a D.O. rather than a M.D.; (3) The procedures utilized by defendants in denying Weiss' application for staff privileges were unfair taken as a whole; (4) There was a conspiracy to deny plaintiff staff privileges because he was an osteopathic physician; (5) The Medical Staff conspired to deny or im-

pede reasonable, fair, equal and full access to staff privileges at York Hospital by osteopathic physicians; (6) This conspiracy constituted an unreasonable restraint on interstate commerce; and (7) York Hospital had monopoly power over the furnishing of inpatient hospitalization services supplied by hospitals and their medical staffs in the York MSA. (PA-99-100). Based on these findings, the District Court concluded that the York Medical Staff had violated Section 1 of the Sherman Act and that York Hospital had violated Section 2 of the Sherman Act. It entered a general prohibitory injunction from which defendants appealed assigning twelve different errors. See RA-1-75

In an opinion authored by Circuit Judge Becker, the United States Court of Appeals for the Third Circuit affirmed the judgment against Petitioner under Section 1 and reversed the finding of liability against York Hospital under Section 2.[2] Initially, the Court of Appeals found substantial evidence to support the jury's conclusion that Petitioner discriminated against D.O.s because they were competitors, and not for any reasons related to assuring quality of care. (PA-66; PA-92). The Court did not reach the question of whether there was evidence that any third persons conspired with the Medical Staff to effectuate this discriminatory policy. That was unnecessary because the Staff itself was a combination of independent economic entities sufficient to supply the joint action requirement of Section 1 of the Sherman Act. (PA-58-62).

Although defendants never raised the question on appeal, the Third Circuit's Opinion went on to consider which level of Sherman Act scrutiny, the rule of reason or the per se rule, was applicable to the Staff's boycott of osteopathic physicians. Here, the Court found, defendants' conduct restrained trade regardless of which of the two analytical approaches was employed,

> "because (1) Weiss met his burden of production and persuasion that the purpose and effect of the defend-

2. The Third Circuit's decision to reverse to the finding of liability under Section 2 of the Sherman Act as against York Hospital is the subject of a separate Petition for a Writ of Certiorari by plaintiff which was docketed in this Court at October Term, 1984, No. 1166.

ants' discriminatory conduct was to 'foreclose so much of the market from penetration by [the M.D.s'] competitors [i.e., the D.O.s] as to unreasonably restrain competition in the effected market, the market for [inpatient medical care],' See *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S.Ct. 1551, 1568 n. 51 (1984), and (2) the defendants — who relied solely on the defense that they had not discriminated against D.O.s — made no attempt to counter this evidence." (PA-70, PA-73-75).[3]

ARGUMENT: REASONS FOR DENYING THE WRIT

A.

This is not the first case to hold that a hospital staff privileges decision violates the Sherman Act under a per se theory of restraint, or otherwise. In fact, the first and only case to reach this Court on the issue, *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), affirmed a finding of *criminal* culpability under Section 1 of the Sherman Act against an association of physicians like Petitioner. There, the association sought to persuade hospitals in metropolitan Washington, D.C. to deny staff privileges to physicians who were affiliated with prepaid health plans. *Id.*, 317 U.S. at 530. Like the petitioner here, the association defended by asserting that somehow this manifest attempt to squelch competition from a competing style of practice was necessary to prevent poor medical care. Yet, this Court affirmed the convictions without elaborate market analysis because of the obvious anticompetitive impact of the boycott and the fact that there was sufficient evidence from which a jury could conclude that the defendant was not "acting only to protect its organization, regulate fair dealing among its members, and maintain and advance the standards of medical practice." *Id.* at 533.

Until the case at bar, no other court has been called on to decide the lawfulness, under the Sherman Act, of a physician sponsored, marketwide foreclosure of hospital staff

3. The Court also concluded that there were "no grounds for distinguishing Weiss and the class under Section 1" — a position which defendants have conceded. (PA-76).

privileges which is unsupported by any legitimate explanation.[4] This is no measure of the inappropriateness of applying the imprimatur of antitrust laws to such conduct, but reflects the fact that such conduct is so obviously anticompetitive and unlawful that no group of physicians has had the gall to engage in such behavior and litigate concerning it.

Petitioner is correct that health care costs are spiralling out of control in this nation.[5] However, it is almost laughable to suggest, as does petitioner, that the costs of litigating several antitrust cases could materially contribute to the 758 billion dollar annual national health care bill. Just the opposite is true. Judicial inadvertence to enforce the antitrust laws in the health care field, particularly in the area of staff privileges, would only exacerbate the escalation of the intolerably high cost of health care.

All of the market analysts who have considered the problem agree that rising health prices are the result of demand increasing out of relation to supply.[6] Available research suggests that in large measure this market instability is the product of a dominant group of physicians concerting their efforts to prevent competition and innovation by competing groups of physicians and styles of health care deliv-

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4. Footnote 2 of the Petition for Certiorari implies the contrary. However, some of the cases cited in footnote 2, such as *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S.Ct. 1551 (1984) do not involve the horizontally concerted actions of competing physicians and thus are not boycott cases. In the remaining cases cited in that footnote, the denial of hospital staff privileges was claimed to be justified by substantial procompetitive benefits such as promoting quality of care. In this case, there was horizontally concerted action by the members of York Hospital's Medical Staff to exclude a competing group from access to York Hospital. Petitioner did not claim that such discrimination was justified. (PA-70 & 73-74). Rather, it simply denied that the discrimination existed, a factual question which was resolved against it by the jury, the District Court, and the Court of Appeals. (*Ibid.*)

5. *See generally*, M. Fletcher, *Economics and Social Problems*, 290 (1979); Drury & Enthoven, "Competition and Health Care Costs", in *The Economy in the 1980's, a Problem for Growth and Stability*, 393-394 (M. Boskin, ed. 1980).

6. See: M. Fletcher, *Economics and Social Problems, supra* at 290.

ery.[7] This abuse finds its most virulent expression in the area of staff privileges. Here, the commentators suggest, physicians frequently exploit their control over hospital access decisions to withhold privileges from competing groups of physicians so as to artificially restrict the supply of providers able to furnish inpatient services and thereby raise the price which incumbent physicians are able to charge.[8] As Professor Havighurst observed:

> "[B]ecause staff privileges are administered primarily by physicians who are competitors of the applicant, antitrust principles apply and their application must reflect the recognition that this substantial power is probably more hazardous to competiton and innovation than any other entrusted to the medical profession."[9]

By applying a per se rule to unjustified efforts of physicians to exclude their competitors from hospital factilities which are competitively essential, the Third Circuit's opinion here remained true to this Court's decision in the *American Medical Association* case and confirmed the vitality of the antitrust laws as a workable tool to restore the natural

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7. Havighurst & King, Private Credentialling of Health Care Personnel," 9 *Am.J. Law and Medicine* 131, 172-173; J. Berlant, *Profession and Monopoly* (1975); E. Freidson, *Profession of Medicine: A Study of the Sociology of Applied Knowledge* (1971); E. Freidson, *Professional Dominance The Social Structure of Medical Care* (1970); Lipscomb, "A Political Economic Theory of the Dental Care Market," 72 *Am.J. Pub. Health*, 665 (1982); P. Starr, *The Social Transformation of American Medicine* (1983); *Comment*, "Antitrust Scrutiny of the Medical Staff Plan," 36 *Maine L.Rev.* 311, 314 (1984); Dolan & Ralston, *supra*, 18 *Hous. L.Rev.* at 739 (1981).

8. See: Comment, "Antitrust Scrutiny of the Medical Staff Plan," 36 *Maine L.Rev.* 311, 328 (1984); Dolan & Ralston, *supra*, 18 *Hous. L.Rev.* at 716 & 744 (1981); Kissam, Webber, Bigus and Holzgraefe, "Antitrust and Hospital Privileges: Testing the Conventional Wisdom," (hereinafter "Kissam & Webber") 70 *Calif.L.Rev.* 596, 601 & 609-11 (1982); Leibenluft & Pollard, "Antitrust Scrutiny of the Health Professions. Developing a Framework for Assessing Private Restraints," (hereinafter "Leibenlulft & Pollard") 34 *Vanderbilt L.Rev.* 927, 932 (1981).

9. Havighurst, C.C. "Professional Restraints on Innovation and Health Care Financing" (hereinafter "Havighurst") 1978 *Duke L.J.* at p. 366.

balance of supply and demand in the health care market.[10] Yet, by recognizing at the same time that the more generous rule of reason analysis applies where privilege decisions are made in furtherance of some legitimate procompetitive values, such as promoting the quality of health care, the decision does not interfere with those aspects of the medical credentials process which promote public health and safety. Moreover, this dichtomy is consistent with the regulatory scheme in most states which generally prohibits medically unjustified denials of privileges and specifically forbids discrimination between M.D.s and D.O.s in gaining access to staff privileges.[11]

Petitioner raises the specter that the Third Circuit's rule in this case will encourage claims that legitimate privilege decisions are antitrust violations and that this prospect will chill physicians in the exercise of those credentialling activities contemplated by various state statutes and the industry's plan of self-regulation. The fact that this chill has not occurred in the forty years since the *American Medical Association* decision is strong evidence that the danger does not exist. Moreover, the risk that a rule of law will be abused is certainly no reason not to have the rule. Considerable protection against abuse exists. One such protection is the cost of antitrust staff privileges litigation itself. Petitioner estimates that it costs Two Million Dollars to litigate a staff privileges case under the antitrust laws. See Petition for Certiorari (hereinafter "*Petition*") at p. 15, n. 19. It is

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10. The commentators agree, as well, that physician sponsored discrimination in granting staff privileges for competitively important hospital facilities, without substantial procompetitive justification, is unlawful regardless of which line of Sherman Act analysis is used. *See:* Kissam & Webber, *supra*, 70 *Calif. L.Rev.* at 604, 651 & 658; Drexel, "The Antitrust Implications of the Denial of Hospital Staff Privileges," 39 *Univ. Miami L.Rev.* 207, 221 (1982); Comment, Antitrust Scrutiny of the Medical Staff Plan, 36 *Maine L.Rev.* 311, 312, 324 & 333 (1984). *See also, Blue Shield of Virginia v. McCready*, 104 S.Ct. 2540, 2543-44 n. 4 (1982). *Williams v. St. Joseph Hospital*, 629 F.2d 448, 453 (7th Cir. 1980); *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 546-47 (5th Cir. 1978).

11. See Compendium of Laws, annexed hereto as Appendix "B", RA-76-79).

extremely unlikely that a disappointed privilege applicant would be willing or able to shoulder such a financial burden, particularly if his case is not meritorious. Moreover, Rules 11 and 56 of the *Federal Rules of Civil Procedure* exist as a substantial prophylactic against the prosecution of meritless claims.

To the extent that petitioner seeks any greater deference from the courts in determining the ultimate question of whether physician sponsored denials of hospital privileges have untoward anticompetitive effects simply because doctors are involved, it seeks a special solicitude under the law which is altogether inappropriate.[12]

B.

Fundamental to the judicial sensibility of this Court is the notion that the Court "reviews judgements, not statements in opinions," and that it will not render advisory opinions on abstract legal questions which are not germane to the outcome of litigation.[13] Moreover, it is essential to the common law adjudicatory process employed by the Court that the parties raise all legal arguments on which they rely at each stage of litigation and appellate review. Thus, this Court has repeatedly ruled that absent extraordinary circumstances it will decline to exercise its power of review over questions which have not been raised by the litigants in the lower courts.[14] Application of these princi-

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12. *See, Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S.Ct. 1551, 1565 n. 42 (1984); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348-51 (1982); *National Gerimedical Hospital v. Blue Cross*, 452 U.S. 378 (1981); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 686-89 (1978).

13. *See, FCC v. Pacific Foundation*, 438 U.S. 726, 734-35 (1978); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1950); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

14. *Hoover v. Ronwin*, 104 S.Ct. 1989, 1998 n. 25 (1984); *F.T.C. v. Grolier, Inc.*, 103 S.Ct. 2209, 2212 n. 6 (1983); *Heckler v. Campbell*, 103 S.Ct. 1952, 1958 n. 12 (1983); *Rogers v. Herman Lodge*, 102 S.Ct. 3272, 3281 n. 10 (1982); *Youngberg v.Romeo*, 102 S.Ct. 2452, 2458 n. 19 (1982); *Delta Air Lines, Inc. v. August*, 450 U.S. 754, (1981); *Steagald v. United States*, 451 U.S. 204, 210-11 n. 5 (1981); *Dotland v.*

ples requires that the instant petition be denied.

The main question raised by the Petition for Certiorari is whether a per se rule should have been applied to measure the lawfulness of the restraint created by the Medical Staff's refusal to grant osteopaths equal access to York Hospital's facilities. Because the jury found that the Petitioner's exclusion of osteopathic physicians unreasonably restrained competition under the more stringent rule of reason charge requested by Petitioner, the issue of which mode of analysis to use became moot. Accordingly, when the Petitioner appealed to the Third Circuit, it simply did not raise the issue.[15] Thus, the Court of Appeals' discussion of which level of Sherman Act scrutiny to apply constitutes a gratuitous opinion on the law not essential to the Court's judgment.

Moreover, even though the Third Circuit ruled that the application of a per se rule was appropriate in view of Petitioner's failure to offer any justification for the obvious anticompetitive consequences of its boycott, the Court also held that petitioner's discrimination against osteopathic physicians unreasonably restrained trade under the more expansive rule of reason analysis. See: PA-75. In order to prevail here, therefore, petitioner must not only persuade this Court to accept its view on the question presented, but it must also obtain a decision in its favor on the question of whether its conduct restrained trade under the rule of reason analysis. However, the Petition for Certiorari does not present this issue for review, nor could it in view of the position taken below. Thus, petitioner's request that this

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NOTES *(Continued)*

Rawlison, 433 U.S. 321, 323 n. 1 (1977); *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 33-34 (1977); *United States v. Lovasco*, 431 U.S. 783, 788 n. 7 (1977); *Cort v. Ash*, 422 U.S. 66, 72 n. 6 (1975); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 147 n.2 (1970).

15. It was not among the twelve questions presented in the Petitioner's brief on appeal. See RA 11-14. Indeed, the only mention of the per se rule there was buried in a two sentence footnote which made no objection to the District Court's rule of reason charge or the propriety of the jury's conclusion, under that charge, that defendant's conduct unreasonably restrained trade. See RA-48.

Court determine whether a per se rule should apply is immaterial to the outcome of this case and improperly requests an advisory opinion on an abstract issue.

Secondly, the petitioner takes the position here that York Hospital and its Medical Staff "are a single enterprise for purposes of §1 of the Sherman Act" and that the Medical Staff thus cannot be considered a combination of independent entities under that Act. See *Petition* at p. 19. This position is completely inconsistent with that which the defendants successfully urged in the Court of Appeals to defeat the judgment against York Hospital under Section 2 of the Sherman Act. There, Defendants specifically argued that the offense of monopolization could not made out by proving a denial of access to noncompetitors of the monopolist in an adjacent market. Accordingly, petitioner took the position that York Hospital and the members of its Medical Staff were separate entities for purposes of antitrust analysis such that the Hospital did not compete with the excluded osteopaths and therefore there could be no liability for denying staff privileges to D.O.s under Section 2. (PA-88-90). To paraphrase the Petition for Certiorari, Petitioner: "seeks to have its cake and eat it too. Either York Hospital and its Medical staff are a single entity (in which event they would be liable for excluding the competing D.O.s under their theory of monopolization) or they are not a single entity (in which event the Staff is an association of competing entities supplying the combination element of a Section 1 offense)." See *Petition* at p. 30, n. 32. Since the position conveniently taken by petitioner with respect to the issue of whether it may be regarded as a combination of independent entities is one which is inconsistent with the position urged and accepted below, review by certiorari is inappropriate.

Finally, the Petition for Certiorari claims that the record presents an issue as to whether the adverse effect on commerce required by Section 1 of the Sherman Act is made out by proof that defendants' general business activities affected commerce or whether the law requires proof that the alleged illegal activities of defendants themselves affected commerce. The Petition also questions whether

the evidence here was sufficient under either test. These putative issues were simply never raised, argued, or decided in this litigation.

At trial, the jury found that defendants' activities "concerning the plaintiff and the plaintiff class" (not their general business activities) had a substantial effect on interstate commerce. (PA-99). Defendants' motions for a directed verdict and brief on appeal never challenged the sufficiency of the evidence to support such a conclusion. (4569a-4570a; RA-60-62). On the contrary, as the Third Circuit found, they expressly "conceded" that if it was correct to focus on the effect of the alleged anticompetitive conduct on defendants' activities in interstate commerce, then the "evidence supports the jury's and the Court's conclusion that the effect on commerce was 'substantial and adverse'." (PA-81). Relying on a Pennsylvania District Court decision, *Cardio-Medical Ass'n v. Crozer-Chester Medical Center*, 536 F.Supp. 1065 (E.D. Pa. 1982), what defendants claimed was only "that in any denial of hospital privileges case the only relevant jurisdictional inquiry" should concern the effect of defendant's anticompetitive activity on "the *plaintiff's* activities in interstate commerce," an effect which plaintiff did not even try to prove. (RA-61; PA-81). The only question which Defendants presented for review by the Third Circuit concerning interstate commerce reflected the limited nature of the issue which defendants raised:

> "8. Did the plaintiff and class fail to establish antitrust jurisdiction where there was no evidence that the alleged violations affected the interstate commerce of the plaintiff or any class member?" (RA-14).

Its analysis in the Court of Appeals was necessarily limited to that issue. See: RA-60-62.

During the pendency of Petitioner's appeal, the Third Circuit reversed the District Court's ruling in *Cardio-Medical* and held that an adverse effect on competition was not limited to proof of an effect on plaintiff's commerce but could be shown by reference to the activities of a defendant or third party in commerce. See PA-81 & *Cardio-Medical Associates v. Crozer-Chester Medical Cen-*

ter, 721 F. 2d 68 (3d Cir. 1983). In this case, the Circuit Court simply applied its *Cardio-Medical* ruling to the issue which defendants presented.[16] See PA-81-82. Petitioner has not presented that issue here.

C.

Petitioner seeks a Writ of Certiorari to review the decision of the Court of Appeals that it was a "combination" for purposes of Section 1 of the Sherman Act. In support of that request for review, Petitioner proposes that the record here compels the conclusion that York Hospital and the members of the Medical Staff are a single enterprise for purposes of the Sherman Act because "in performing credentialing functions the members of the York Medical Staff were required to have an identity of interest with the Hospital." See *Petition* at pp. 18-19. Alternatively, the Staff claims that there was "no proof" of a conspiracy because "all staff credentialing decisions were made 'unilaterally' by York Hospital's Lay Board of Directors." See *Petition* at pp. 18 & 21-22. Incredibly, to support these notions, the Petitioner does not point to a single item in the trial record.[17] Rather, it generously indulges in citation to federal and state regulations and the accreditation standards of the JCAH[18] and makes allusions to some scant pretrial mate-

16. In *Cardio-Medical Ass'n v. Crozer-Chester Medical Center*, 721 F.2d 68 (3rd Cir. 1983), the Third Circuit ruled that an "infected activities" test was appropriate under Section 1 of the Sherman Act. *Id.* at 74-75. By the interal operating rules of the Circuit, the Panel in this case was obliged to follow that precedent to the extent that it was called upon to decide the same issue. Moreover, the Circuit Court's decision here manifested its view that the infected activities test was the appropriate one when it observed that the law requires that "the proscribed conduct . . . has a 'substantial adverse effect' on interstate commerce." See PA-80.

17. The trial records begins in the Appendix on Appeal at page 3437a. The scant reference to the proceedings in the lower court which Petitioner makes in its discussion of the relationship between the Hospital and the Medical Staff are all to portions of the appendix appearing before that page.

18. Despite the existence of these regulations and the JCAH accreditation standards, the legal, administrative and economic relations between hospitals and their medical staffs varies a great deal among

rials. However, defendants did not show that they were subject to the federal and state regulations to which they point, let alone demonstrate that they complied with those regulations. Petitioner did not even prove that York Hospital was accredited by JCAH, let alone show its standards or compliance with them. And the pretrial materials on which Petitioner relies were so thoroughly impeached that defendants did not proffer them at trial.

Repeatedly, this Court has admonished that it will not consider "facts" which are not of record.[19] Regardless of what petitioner might have shown in the abstract and regardless of what allocation of responsibilities should or might exist at some hypothetical hospital, what *this* trial record shows, without contradiction, is that *this* Hospital Board delegated all decision making responsibility for determining both the criteria for granting staff privileges and compliance with those criteria to the Petitioner-Medical Staff. Evidence, including the minutes of the Board of Directors, shows that the only responsibility the Board retained and exercised with regard to staff privileges was determining whether the staff had followed the hearing procedures established by Petitioner itself in its own Bylaws. (1690a; 1693a; 3821a; 4150a-4152a; 4501a-4502a; 4777a-4780a). Indeed, the Hospital's Vice-President for Medical Affairs was constrained to admit that the Hospital Board simply served as a rubber stamp for decisions by the Medical Staff committees concerning staff privileges:

NOTES *(Continued)*

hospitals depending on the hospitals' legal structure, market power, and administrative philosophy. See, M. Roemer and J. Friedman, *Directors in Hospitals: Medical Staff Organization and Hospital Performance* (1971); Kissam & Webber, *supra*, 70 *Calif. L. Rev.* at 605 (1982). The commentators who have reviewed the way in which privileges are awarded under the JCAH accreditation standards have concluded that the medical staff is the significant entity of the process and, therefore, staff privilege decisions which further the economic interests of the medical staff should be considered the product of a physician cartel. Kissam & Weber, *supra*, 70 *Calif. L. Rev.* at 606-613, 639-40; Dolan and Ralston, *supra*, 18 *Houston L. Rev.* at 712.

19. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972); *New Haven Inclusion Cases*, 399 U.S. 392, 450 (1970); *Lawn v. United States*, 355 U.S. 339, 354 (1958).

"A. The Board of Directors at York Hospital operates by committees and the endorsement by the Medical Staff Committee virtually amounts to an endorsement by the Board. (3821a)

Specifically, with regard to the issue of osteopathic physicians gaining access to the use of York Hospital's facilities, the record shows that the Hospital and the M.D.s on its Medical Staff did not have an identity of interest. Instead, their interests were diametrically opposed. There was no question that osteopaths were well qualified as a group. Thus, as plaintiffs' economist testified, permitting D.O.s to practice at York Hospital would only serve to maximize demand for hospital services and therefore benefit the Hospital. See: 3871a-3872a. Presumably, it was for this reason that the Hospital changed its Charter in 1974 to permit D.O.s to join the staff. The uncontradicted economic testimony also shows, however, that opening the staff to osteopaths would create additional competition for the existing M.D. staff, reducing the demand for their services, and would, therefore, be contrary to their economic interests. See: 3877a. The evidence is also without contradiction that the hospital completely capitulated to the contrary interests of the medical staff in this regard. Although the Hospital determined in 1974 to amend its Charter to permit the admission of osteopathic physicians, the Hospital's President explained that:

"The Board of Directors in enacting the change of the charter felt that it was very important that a change of the charter would not indicate to the Staff that they had to make a change in the bylaws [which barred D.O.s from its Staff] but that it is something the Medical Staff themselves should evaluate and make a decision." (4502a)

Thus, the Board expressly delegated to the Medical Staff final authority to exclude osteopathic physicians from the Hospital in furtherance of their own economic interests, contrary to the financial interests of the Hospital.

Accordingly, support for the alternative factual assertions that the members of the Medical Staff and the Hospital had or were "required" to have the same interests with

regard to the admission of osteopathic physicians or that the Hospital alone was the "decision maker" with regard to staff privileges is not only absent from but contradicted by the trial record. In the absence of the factual basis for the application of the legal principles urged by Petitioner, the grant of certiorari would be an empty gesture.

D.

With regard to Petitioner's claim that the Court of Appeals was "wrong" in holding that the Medical Staff was a combination, the Petitioner's legal position is somewhat muddy. It appears to be the Petitioner's claim that despite the fact that the members of the staff are otherwise independent entities, the fact that they are "required" to act as agents for the benefit of the Hospital in making staff access decisions renders them one single entity incapable of conspiring with respect to such decisions. The only appellate support tendered for this proposition is this Court's decision in *Copperweld Corp. v. Independence Tube Corp.* (hereinafter "*Copperweld*"), 104 S. Ct. 2731 (1984), in which this Court held that a parent and a subsidiary corporation were not economically distinct and therefore were incapable of forming a Sherman Act conspiracy.

Before this Court's decision in *Copperweld*, the Intra-enterprise Conspiracy Doctrine permitted a conspiracy to be defined as including legally distinct entities who were part of a single firm such as a parent and a wholly owned subsidiary. See, *e.g.*, *Kieffer-Stewart Company v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951). In *Copperweld*, this Court rejected an approach to the Sherman Act which depended on formal legal distinctions. In enacting Section 1 of the Sherman Act, the Court reasoned, Congress was concerned with distinguishing between single firm and multi-firm conduct in economic terms. *Copperweld*, 104 S. Ct. at 2740-41. Accordingly, for purposes of ascertaining plurality of action under Section 1, the legal relationship between the parties was irrelevant. What was important was whether they were "separate economic actors." *Id.* at 2741 & 2742.

Agency, the relationship wherein there is a manifestation of mutual assent for one to act for the benefit of another is, like the relationship betwen a parent and a subsidiary, a legal conceptualization not an economic one. Thus, under the teaching of *Copperweld*, it should be irrelevant to the process of ascertaining plurality of action under Section 1. This was the precise import of the Court's ruling in *American Association of Mechanical Engineers v. Hydrolevel Corp.*, (hereinafter "*Hydrolevel*"), 102 S. Ct. 1935 (1982). There the Court considered whether the action of an "agent" of a trade association of otherwise independent entities, who was also an officer of one of the entities, sufficed to impose liability on the association ("ASME") under Section 1. The Court ruled that:

> "Whether they intended to benefit ASME or not, ASME's agents exercise economic power because they act with the force of the Society's reputation behind them. And, whether they act in part to benefit ASME or solely to benefit themselves or their employers, ASME's agents can have the same anticompetitive effects on the marketplace. The anticompetitive practices of ASME's agents are repugnant to the antitrust laws even if the agents act without any intent to aid ASME, and ASME should be encouraged to eliminate the anticompetitive practices of all of its agents acting with apparent authority, especially those who use their positions in ASME solely for their own benefit or the benefit of their employers." *Id.* at 1946.

Thus, under this Court's conspiracy cases the test for determining whether members of an organization are independent entities for purposes of the Sherman Act is not the subjective inquiry determinative of agency — for whose benefit a particular action is taken.[20] Rather, it looks to the traditional objective indicia of economic independence:

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20. *Hydrolevel; United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States v. Sealy*, 388 U.S. 350, 353-54 (1967); *Silver v. New York Stock Exchange*, 377 U.S. 341, 347-48 (1963); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 481 (4th Cir. 1980) *cited with approval in Blue Shield of Virginia v. McCready*, 102 S.Ct. 2540, 2543 n. 4 (1982).

"whether persons pool their capital and share the risks of loss as well as the opportunities for profit."[21] Where they do not do so but separately pursue the opportunity for profit they are considered independent economic entities.[22] Where an organization, however legally established, is composed of such independent economic entities, then the organization is deemed to be a combination among its members within the ken of Section 1.[23]

Here, the Circuit Court applied these principles to the undisputed facts. Faithful to the principles of *Copperweld*, it looked beyond the form of the legal relationship among the members of the Medical Staff and the Hospital to the economic reality of the arrangement. It found that the members of the Medical Staff were "independent practitioners" who separately treated and charged patients without pooling their capital and sharing the risks of loss as well as the opportunity for profit and was required to conclude that "the York Medical Staff is a group of doctors, each of whom is a independent economic entity in competition with other doctors in the York medical community." See: PA 58-59. Refraining from any analysis of who was benefitted or intended to be benefitted by the Staff's activities, as it was required to do, the Court likewise had no choice but to conclude that this admitted association of economically independent units was a Sherman Act combination as a matter of law. All of the commentators and the few appellate decisions which have considered the issue have concluded likewise.[24]

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21. *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 2479-80 (1982). *Accord, e.g., United States v. Sealy, supra*, 388 U.S. at 353-54; *Simpson v. Union Oil Company*, 379 U.S. 13, 15 (1946); *Virginia Academy of Clinical Psychologists of Blue Shield of Virginia, supra*, 624 F.2d at 481; *Associated Press Company v. United States*, 326 U.S. 1 (1943).

22. *Ibid.*

23. *Ibid.*

24. *See, American Medical Association v. United States*, 317 U.S. 144 (1970); Kissam & Webber, *supra*, 70 *Calif. L. Rev.* at 606-11, 638-39, 606-11 (1982); Dolan & Ralston, *supra*, *18 Houston L. Rev.* at 712 & 742 n. 136. *See also, Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (7th Cir. 1984); *Health Care Plan of*

Petitioner weakly argues this Court's conspiracy cases should not be applied here because the Medical Staff is organized to advance a common interest, to achieve socially beneficial purposes which cannot be accomplished except through concerted action and that the existence of the staff is required and regulated by law. However, commonality of interest exists in every cartel. What *Copperweld* and the other decisions of this Court teach is that Congress intended the concept of "combination" to distinguish, in an economic sense, between single firm and multi-firm conduct. The purpose of an organization and the law governing its formation and existence are simply not germane to this economic inquiry. Thus, in *Silver v. New York Stock Exchange*, (hereinafter "*Silver*"), 377 U.S. 341 (1963) and *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia* (hereinafter "Virginia Academy"), 624 F.2d 476 (4th Cir. 1980), the fact that defendants were organized as mandated by law did not preclude analysis of the economic effect of the resulting combination under Section 1 of the Sherman Act because the members of the alleged combinations maintained their economic identities. And in *Silver*, *Virginia Academy*, and *Hydrolevel*, as well as in *NCAA v. Board of Regents of the University of Oklahoma* (hereinafter "NCAA"), 104 S.Ct. 2948 (1984), *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), and *Associated Press v. United States*, *supra*, the fact that the defendant-Associations could only achieve socially beneficial purposes through concerted action did not alter the fact that the independent economic identity of their members rendered the activities of each subject to analysis under Section 1 as a matter of law.[25]

New Jersey v. West Jersey Hospital, [1982-1983] Trade Cases (CCH) ¶65,067 (D.N.J.); *Addino v. Genes, Valley Medical Care, Inc.*, [1984] Trade Cases (CCH) ¶66,289 (W.D.N.Y.); *Hoffman v. Delta Dental Plan of Minnesota*, 517 F. Supp. 564 (D. Minn. 1981).

25. Questions concerning the purposes of an organization and whether it is required and regulated by law, while not material in the determination of plurality of action are, of course, central to other antitrust issues — whether the combination restrains trade or is immune from Sherman Act liability under the state action doctrine enunciated in *Parker v. Brown*, 317 U.S. 341 (1943). However, if these questions

Insofar as the conspiracy question is concerned, the most we have here is an application by the Court of Appeals of clear principles of law recently articulated by this Court to facts which are virtually undisputed without any conflict among the circuits or any cogent argument for a change in the law. That simply does not warrant review by this Court.

E.

Petitioner attempts to bring this case within the considerations which prompted the grant of certiorari in *Northwest Wholesale Stationers v. Pacific Stationery & Printing Company*, October Term, 1983, No. 1368, by asserting that in assessing the reasonableness of the restraint created by petitioner's conduct, the Circuit Court erred by creating a "new per se rule" and applying it without "minimum" analysis of the purpose and economic effect of the alleged restraint. Yet, examination of the record and judicial opinions in this case render any analogy to *Northwest Wholesale Stationers* facile and disingenuous.

Among the categories of conduct which this Court has long considered as "naked restraints" in violation of the Sherman Act are group boycotts which, for purposes of the per se rule, may be defined as a concerted attempt by a group of competitors at one level of distribution to insulate themselves from competition from non-group members by depriving them of a trade relationship which they need in order to compete at the level of competition at which the group competes.[26] Petitioner does not contend otherwise. However, Petitioner asserts that a boycott is not actionable under the per se rule absent proof of coercion. See *Petition* at p. 23. Petitioner offers no support for this proposition and none can be found.

NOTES *(Continued)*

are to be considered, they should be considered in connection with such issues only.

26. *E.g., United States v. General Motors Corp.*, 384 U.S. 127 (1966); *M & H Tire Company v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 980 (3d Cir. 1984); *Kreuzier v. American Academy of Periodontology*, 735 F.2d 1479, 1493 (D.C. Cir. 1984); L. Sullivan, *Antitrust* 230, 232, 244 (1977).

As the Third Circuit here ruled "a boycott is not illegal under the antitrust laws because of opposition to the use of coercion." (PA-68-69). Rather, the per se ban reflects the concern of the antitrust laws with the effect of such behavior on competition. By depriving competitors of goods and services which are necessary to effectively compete, the group inducing a refusal to deal prevents or impedes competition with the members of the group. This reduces supply or "output" relative to demand thereby threatening an artificial increase in costs and diminution in quality.[27] Thus, there are a plethora of decisions by this Court, ignored by Petitioner, which find per se illegality when a group of competitors at one level of distribution uses its relationship with a supplier of competitively important goods or services to prevent access by competitors of the group to such goods and services without proof of coercion, intimidation, or threats of boycotts against the supplier.[28]

In this case, access to York Hospital's facilities was essential to any physician seeking to compete in supplying in-patient care in the York MSA. When the combination of allopathic physicians represented by Petitioner acted to prevent their competitors, the osteopathic physicians, from obtaining access to these competitively important facilities, they plainly engaged in a classic boycott. Thus, the Court of Appeals was undoubtedly correct in concluding that in the absence of some counterveiling competitive consider-

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27. *E.g., Kreuzer v. American Academy of Periodontology, supra,* 735 F.2d at 1493-94; *Marese v. American Academy of Orthopedic Surgeons,* 706 F.2d 1488, 1495-96 (7th Cir. 1983); L. Sullivan, *Antitrust* §85 (1977); Dolan & Ralston, *supra,* 18 *Houston L. Rev.* at 716-17 (1982). *See also: NCAA v. Board of Regents of the University of Oklahoma,* 104 S.Ct. 2948 (1984).

28. *United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Radiant Burners v. Peoples Gas, Light & Coke Company,* 364 U.S. 656 (1961); *Associated Press Company v. United States,* 326 U.S. 1 (1945); *American Medical Association v. United States,* 317 U.S. 519 (1943); *United States v. Terminal Railroad Association,* 224 U.S. 383 (1912); *American Accord, e.g., Wilk v. American Medical Association,* 719 F.2d 207, 230 (7th Cir. 1983).

ation, Petitioner's conduct was a restraint of trade under a per se rule which is almost as old as the Sherman Act itself.[29]

Plainly, a Court reviewing a staff privilege policy under the antitrust laws would be wrong if it is stopped here and failed to consider any justification offered for the boycott, but that does not mean that a full blown rule of reason analysis is required either. This Court has recognized that there may be factors implicit in the public service aspect of the professions, efforts at industry self-regulation, or the peculiarities of certain forms of collusion which render pro-competitive conduct which might otherwise be considered a naked restraint under the per se rule.[30] These cases teach that consideration should be given to such pro-competitive factors, but at the same time recognize that the 90 year experience of the judiciary which nourished the creation of per se rules in the first instance is not to be jettisoned either. What the cases hold is that where there is conduct which fits the description of a per se violation, such as a group boycott, the defendants may assert that because of the public service aspects of the business or otherwise, their conduct actually regulated and thereby promoted competition. When such pro-competitive justification is proffered, the Court is required to withhold consideration under the per se rule and to "facially" balance the presumed anticompetitive effects of the practice against the

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29. The Third Circuit concluded that "the facts of this case do not precisely fit into the mold of a classic refusal to deal" because the hospital did admit some D.O.s and "arguably then what is at issue is not a boycott but mere discrimination which sounds less like a per se antitrust violation." (PA-69) However, the Court concluded, "we are satisfied that the restrictive policy is, in purpose and effect, sufficiently close to the traditional boycott that the characterization is appropriate." (PA-70) The cases generally sustain the notion that a refusal to deal on equal terms — discrimination — is by its purpose and effect equivalent to a group boycott. *See, Klor's Inc. v. Broadway Hill Stores, Inc.*, 359 U.S. 207, 212-12 (1959); *W.W. Montague & Company v. Lowery*, 193 U.S. 38 (1904); *St. Bernard General Hospital v. Hospital Service Association*, 712 F.2d 978, 987 (5th Cir. 1983).

30. *E.g., Arizona v. Maricopa County Medical Society*, 421 U.S. 773, 788 n. 19 (1975); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978).

positive competitive effects, if any, without engaging in any detailed market analysis.[31] As the Court said in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, (hereinafter "*Broadcast Music*") 441 U.S. 1, 16 n. 33:

> "The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, *see, National Society of Professional Engineers v. United States*, 435 U.S. 679, 690-92 (1978) or else we should apply the rule of reason from the start."

If the justification remains factually unproven, is not based on pro-competitive effects or does not facially outweigh the anticompetitive effect, the restraint is branded unreasonable as a "naked restraint"; otherwise, the rule of reason is brought to bear.[32]

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31. *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 104 S. Ct. 2948, 2963-64, 2965, 2967 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 16, 19-20 (1979); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692-696 (1978); *Silver v. New York Stock Exchange*, 373 U.S. 341, 347-48 (1963); *American Medical Association v. United States*, 317 U.S. 519, 531 (1943); *Kreuzier v. American Academy of Periodontology*, 735 F. 2d 1479 (D.C. Cir. 1984); *St. Bernard Hospital v. Hospital Service Association*, 712 F.2d 978 (5th Cir. 1983); *United States v. Realty Multilist, Inc.*, 629 F. 2d 1351 (5th Cir. 1980); *Virginia Academy of Clinical Psychologists v. Blue Shield*, 624 F. 2d 476, 485 (4th Cir. 1980).

32. See cases cited at footnote 31, *supra*.

Lower courts and commentators have variously described these cases as using a "per se rule", a "modified per se rule", an "abbreviated" or "truncated" rule of reason analysis, a "modified" rule of reason approach, a rule of "facial unreasonableness", and simply a "rule of reason." See, *e.g.*, Dolan & Ralston, *supra*, 18 *Houston L. Rev.* at 741; Havinghurst, *supra*, 1978 *Duke L.J.* at 348 n. 194; Kissam, *Antitrust Law, The First Amendment, and Professional Self-Regulation, Regulating the Professions*, 143 (R. Blair & S. Rubin, eds. 1980); Sullivan & Wiley, "Recent Antitrust Developments", 27 U.C.L.A. L. Rev. 265, 323 (1972). These differences in labelling are attributable to the fact that both per se rules and the rule of reason form part of a continuum which measures the same thing and that these cases fall in that space between the two where there is "no bright line" of separation. *National Collegiate Athletic Assocation v. Board of Regents of University of Oklahoma, supra*, 104 S. Ct. at 2942 n. 26 and 2965; *National Society of Professional Engineers v. United States, supra*, 435 U.S. at 692.

Here, the Court of Appeals simply applied these principles in a fashion which was more than indulgent to defendants. It clearly stated that it would "utilize a rule of reason balancing approach" rather than a per se approach, if defendants offered any "legitimate explanation for their discrimination." (PA-70). However, the Court could not even reach the threshhold issue of whether to withhold per se treatment because the defendants did not seek to offer such justification. As the Court observed "their defense at trial was that they did not discriminate against D.O.s." (PA-70) "Since the jury believed otherwise," (PA-73), the Court had no choice but to conclude "that a per se rule should be applied, since the effect of the practice is identical to that of the traditional boycott, and plainly anticompetitive." (PA-70).

Petitioner seeks to escape the force of this conclusion through two routes. First, petitioner asserts that there are "significant economic distinctions" peculiar to the health care industry which reduce the level of competition below that found in other industries. This, petitioner claims, somehow warrants application of a rule of reason standard to judge the effects of its boycott against osteopathic physicians. Petitioner fails to cite any support for this proposition and none can be found. All of the cases, *Silver*, *Broadcast Music*, *Professional Engineers*, and *NCAA*, expressly reject the use of extensive industry analysis as a rationale for non-application of rules against naked restraints.[33] Moreover, in *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 2475-78 & 2479, and in *Jefferson Parish Hospital District No. 2 v. Hyatt*, 104 S.Ct. 1551, 1566-67 (1984), this Court expressly disavowed the notion that the factors cited by defendant — pervasive third party reimbursement, extensive government regulation, and poor consumer information — warranted distinguishing the health care industry from other industries for pur-

NOTES *(Continued)*

While there may be some differences in what to call the analysis, however, what is important is that the rule applied is consistently the same. L. Sullivan, *Handbook of the Law of Antitrust*, §88 at (1977); Leibeloft and Pollard, *supra*, 34 *Vanderbilt L. Rev.* at 945-47 (1981).

33. See Footnote 31 and accompanying text, *supra*.

poses of antitrust analysis. But perhaps most importantly, petitioner offers no economic explanation for why an overall lack of competition in the market justifies a reduction in the level of scrutiny to be applied to assess anticompetitive behavior in the industry. Just the opposite would seem to be true.

Ultimately, then, in order to escape the conclusion that its anticompetitive boycott was a naked restraint under the decisional paradigm consistently applied by this Court, petitioner is forced to claim that Judge Becker misrepresented the record when he found that defendants failed to offer any justification for their policy of discrimination. Plainly, it is inappropriate to request the issuance of a writ of certiorari on the ground that an experienced panel of circuit judges in writing a 96 page opinion overlooked or misrepresented such an essential fact.[34] It is also inaccurate.

In both the district court and the court of appeals, defendants did not seek to justify the discriminatory policy adopted with respect to the credentialling of osteopathic physicians. Rather, each of the ten representatives of the Medical Staff who took the stand at trial stallwartly denied the existence of any discrimination between D.O.s and M.D.s.[35] That tactic having failed below, they rely on one passage of Dr. Bacastow's testimony to support the assertion here, for the first time, that the application of more stringent standards of competence and integrity to osteopathic physicians was necessary because of the Petitioner's "unfamiliarity" with their training, background and references. See *Petition* at p. 5. This newly proffered justification is false, misleading and irrational.

Dr. Bacastow testified unequivocally that he was familiar with the training and background of D.O.s and that there was no difference between them. (3806a) Both the Hospital and the Medical Staff thoroughly studied the training and educational regimen for osteopathic physicians

34. See, *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma* 104 S.Ct. 2948, 2959 (1984); *Branti v. Finckel*, 445 U.S. 507, 512 n.6.

35. See: 4636a-4637a; 4639a-4641a; 4749a; 4773a-4774a; 4835a-4836a; 4843a; 4853a; 4868a; 4879a; 4962a; 4990a-4997a.

and concluded likewise. (4025a) And because osteopaths were required to refer their patients to the M.D.s at York Hospital, those M.D.s were certainly familiar with the osteopathic physicians in the county who would serve as sources of referral information. (5260a-5261a) Finally, the justification now offered by the Medical Staff might warrant a more searching application of uniform standards of competence to the applications of osteopathic physicians, but it makes no sense as a rationale for imposing completely different criteria of acceptability on them as Petitioner did.[36]

Thus, petitioner can point to no deviation from clearly articulated decisions of this Court or the creation of an intercircuit conflict as the basis for granting a writ of certiorari on the per se rule reason "issue." Its sole basis for requesting certiorari — that the Court of Appeals "overlooked" market structure and procompetitive justification —is not only an inappropriate basis for granting the writ but it is, like the issue itself, simply a myth created by a party who lost a factual dispute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

MICHAEL D. FISHBEIN
Attorney For Respondent

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36. Petitioner also claims that the Third Circuit relegated its claims regarding Dr. Weiss' professional competence and character for consideration only during the damage phase of the bifurcated trial. This claim is also false. Defendants offered evidence concerning Dr. Weiss' competence and character during the liability phase of trial to prove that Weiss was excluded from the Staff because of his allegedly poor qualifications and not because of discrimination against osteopaths. None of this evidence was excluded. However, the jury did not credit it, expressly finding that Weiss "would have been granted staff privileges at York Hospital but for the fact that he was an osteopathic physician rather than an allopathic physician" and that his exclusion from the Staff was the result of a conspiracy to deny staff privileges to osteopathic physicians. See: PA-99.

APPENDIX

BEST AVAILABLE COPY

A-1

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 82-3507, 82-3580, 82-3581

MALCOLM WEISS,
Plaintiff, Appellant in No. 82-3581

v.

YORK HOSPITAL, et al.,
Defendants, Appellants in Nos. 82-3507, 82-3580

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANTS YORK HOSPITAL, MEDICAL AND DENTAL STAFF OF YORK HOSPITAL, THOMAS L. BAUER, IVAN L. BUTLER, SAMUEL W. DEISHER, AND LOIS N. KUSHNER

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STATEMENT OF SUBJECT MATTER JURISDICTION

The Court has subject matter jurisdiction of these consolidated appeals as follows. In No. 82-3507, appeal was taken from the entry of an injunction before final judgment in the court below so that subject matter jurisdiction is appropriate pursuant to 28 U.S.C. §1292(a)(1). In No. 82-3580, appeal was taken from entry of a judgment certified by the court below as final upon a proper determination by the district court that there is no just reason for delay and upon that court's express direction for the entry of judgment under F.R.Civ.P.54(b). Jurisdiction in that appeal is provided by 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Did the district court err in certifying a plaintiff class of 92 osteopathic physicians in a refusal to deal antitrust case concerning the denial of hospital staff privileges where:

(a) only one such physician, the named plaintiff, made a demand which was rejected for staff privileges;

(b) seven other such physicians made applications for staff privileges, six of which have been granted and the remaining one was pending;

(c) all such physicians are located in one county and can be identified with minimal effort;

(d) each such physician, under applicable law, must individually demonstrate his or her qualifications to obtain staff privileges;

(e) the complained of conduct allegedly caused the named plaintiff to be rejected for staff privileges while such conduct allegedly caused the class to be dissuaded from applying for staff privileges: and

(f) the plaintiff competes for staff privileges with all members of the plaintiff class?

2. Did the district court err in holding York Hospital (the "Hospital" or "York") and its Medical Staff (the "Staff") liable to the plaintiff class under the antitrust laws for refusal to grant staff privileges where no class member, other than the plaintiff, has ever made a demand for staff privileges at that hospital?

3. Did plaintiff and the class fail to demonstrate injury in fact under the antitrust laws where there was no showing of lost patients, income, or profits or any other cognizable economic harm by reason of the fact each was not a member of the Staff?

4. Was it error to hold the Staff liable to the class under §1 of the Sherman Act for conspiring to exclude osteopaths from staff privileges where:

(a) the Staff, as required by law, is a division of the Hospital which was found by the jury not to have conspired;

(b) the jury found that no other defendant conspired to exclude osteopathic physicians from Hospital staff privileges; and

(c) there is no evidence that a third party so conspired with the Staff?

5. Was it error to conclude that the relevant product market in a Sherman Act case is "inpatient hospital health care services supplied by hospitals and their medical staffs" where:

(a) such services range, for example, from open heart surgery to child birth and include many other recognized specialties; and

(b) there was no evidence of cross-elasticity of supply or demand among such varied services?

6. Under §2 of the Sherman Act, was it error to hold York liable to a physician and class who are not in competition with the hospital?

7. Was it error to hold York liable to the plaintiff and class for monopolization, attempting to monopolize, and for conspiring to monopolize the relevant product market, where there was no showing:

(a) that the Hospital can control prices since substantially all charges for hospital care are paid by and based on agreements with third parties;

(b) that the Hospital can exclude competition such as other hospitals from the relevant product market;

(c) that the Hospital wilfully acquired or maintained any power to so control or exclude?

(d) that the Hospital had a specific intent to monopolize, or engaged in any conduct to achieve a monopolization of, or had a dangerous probability of achieving a monopoly in such market; and

(e) that a third party so conspired with the Hospital, and the jury found that no other defendants so conspired?

8. Did the plaintiff and class fail to establish antitrust jurisdiction where there was no evidence that the alleged violations affected the interstate commerce of the plaintiff or any class member?

9. Were all defendants entitled to summary judgment and a directed verdict and judgment n.o.v. in their favor:

(a) where as to the class' claim, there was no dispute that no class member had applied for but had been denied Hospital staff privileges; and

(b) where as to the plaintiff's claim, there was no evidence to dispute the affidavits denying wrongdoing?

10. Did the district court err or abuse its discretion in enjoining York and the Staff where:

(a) there was no violation of the antitrust laws;

(b) the plaintiff and the class have an adequate remedy at law;

(c) the terms of the injunction on its face are vague, contradictory, and in patent violation of state law; and

(d) the injunction imposed a standard of medical expertise without any record evidence of the meaning or appropriateness of the standard?

11. Was it error to hold York and four physicians

who, as committee members, reviewed plaintiff's application for staff privileges, liable to plaintiff for intentional interference with existing contractual relations where plaintiff never:

(a) identified a single contract or patient relationship which was disrupted:

(b) showed any such contract or relationship was disrupted because of the denial of his application;

(c) showed that such disruption, if any, was intended by the defendants; and

(d) showed any resulting actual loss?

12. Did the district court err or abuse its discretion in failing to conduct the trial in the Harrisburg Division where the suit was filed and all of the parties and non-expert witnesses, but none of the jurors, resided?

STATEMENT OF THE CASE

I. Nature of the Case.

On February 6, 1980, plaintiff Malcolm Weiss ("Weiss"), a doctor of osteopathy, filed this action in the United States District Court for the Middle District of Pennsylvania at Harrisburg. The Complaint named York Hospital and the York Hospital Medical and Dental Staff as defendants. Weiss alleged that his application for Staff privileges at the Hospital was denied because of: a concerted refusal to deal with him and all other osteopathic physicians[1] located in and around York, Pennsylvania, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1; monopolization, attempted monopolization, and conspiracy to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. §2; and violation of Pennsylvania antitrust and common law. 51a-58a.

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1. The distinction between osteopathic physicians (D.O.'s) and allopathic physicians (M.D.'s) is described by the Court in *DeMasi v. Weiss*, 669 F.2d 114, 116 nn. 1, 2 (3d Cir. 1982) ("*DeMasi*").

After the district court granted the motion of the Hospital and Staff to dismiss (137a-153a), Weiss filed a First Amended Complaint on June 2, 1980. In this complaint, as further amended, he named ten additional defendants, the five physicians who in their capacity as members of the Staff's Medical Executive Committee voted on his application for privileges, and the five physicians who constituted the Judicial Review Committee specially impanelled at the Hospital to review, at Weiss' request, the recommendation by the Medical Executive Committee that his application be turned down. The alleged relevant geographic market coincided with the York Medical Service Area ("MSA"), a health care planning area designated by the eight county regional health systems agency ("HSA"). 185a-203a; 582a.

On May 28, 1981, following a two day hearing, the trial court granted plaintiff's motion for class action certification, determining that the action could be maintained under F.R.Civ.P. 23(b)(2) on behalf of a class of all osteopathic physicians practicing medicine in the York MSA. 1505a-1526a.

On September 25, 1981, the district court denied the motion by all defendants for summary judgment. 2238a-2247a. The court's opinion is reported as *Weiss v. York Hospital*, 524 F.Supp. 433 (M.D.Pa. 1981).

On January 8, 1982, this Court rendered its decision in two consolidated proceedings for writs of mandamus and prohibition related to this case. In one matter, No. 81-2192, the Court denied the petition directed to the district court's certification of the plaintiff class, holding that mandamus and prohibition were not available in the circumstances of the case to review the trial court's action. In the other matter, No. 81-2171, the Court expressed serious doubts about a discovery order issued by the district court directing approximately 100 allopathic physicians to disclose confidential income data. The Court denied the petition at that time but retained — and still retains — jurisdiction in the matter until completion of the liability phase of the bifurcated trial in the

district court. The opinion in both matters is reported as *DeMasi*.

Thereafter, defendants filed a motion to decertify the class (2592a-2609a), which motion was denied on August 18, 1982. 3225a-3230a.

On September 30, 1982, following a three week jury trial on liability and a one day hearing on equitable relief, the district court entered its opinion, order, and judgment. 6327a-6341a. These are reported as *Weiss v. York Hospital*, 548 F.Supp. 1048 (M.D.Pa. 1982).[2] In this opinion, the court entered findings of fact based upon the jury's answers to over 40 special verdict questions[3] and other evidence received in connection with plaintiff's application for injunctive relief. The court also entered conclusions of law determining that:

> 1. On the §1 claim, the Staff (but not the Hospital) is liable to the plaintiff class but not to Weiss;
>
> 2. On the §2 claims, the Hospital (but not the Staff) is liable to both Weiss and the class for monopolization, attempted monopolization, and conspiracy to monopolize;
>
> 3. On the pendent state law claims, the Hospital (but not the Staff) and four physicians are liable to Weiss but not the class for interference with contractual relations, and
>
> 4. The remaining six physician defendants are not liable to anyone for anything.

6339a-6340a, 548 F.Supp. at 1060-61.

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2. This opinion is so frequently cited herein in parallel to the joint appendix cite that only the volume and page of F.Supp. are employed. *E.g.*, "548 F.Supp. at 1053."

3. All jury trials conducted by the district judge employ the special verdict procedure. 81a.

The following is a chart presentation of the court's ruling:

DEFENDANTS Including Specialty & Position	§1 Sherman Act (Class)	§2 Sherman Act (Class Monop	Attempt	Consp)	State Law Not Class
York Hospital	—	W + C	W + C	W + C	W
York Hospital Medical Staff	C	—	—	—	—
Ardison Family Practice—MEC	—	—	—	—	—
Bauer Surgeon—MEC	—	—	—	—	W
Butler Neurosurgeon—MEC	—	—	—	—	W
Deisher OB-GYN-JRC*	—	—	—	—	W
Kline Internist—MEC	—	—	—	—	—
Kushner Radiologist—MEC*	—	—	—	—	W
Laucks Psychiatrist—JRC	—	—	—	—	—
MacDougall Family Practice—JRC	—	—	—	—	—
MacKenzie Internist—JRC	—	—	—	—	—
Whiteley Pathologist—JRC	—	—	—	—	—

W = Liable to named plaintiff
C = Liable to class
— = Exonerated
JRC = Judicial Review Committee
MEC = Medical Executive Committee
* = Chaired Committee

Based on this determination, the court entered an order pursuant to §16 of the Clayton Act, 15 U.S.C. §26, enjoining the Hospital and the Staff from:

> 1. undertaking any act against Weiss or the class "which would in any way impede or deny the Plaintiffs full, reasonable, fair, or equal access to the facilities of York Hospital and full, reasonable, fair or equal access to staff privileges at York Hospital";
> 2. applying standards of review of applications from osteopathic physicians different from the standards applied to similar applications from allopathic physicians, and

3. interpreting the expression "American Board of Medical Specialty" in the Staff by-laws to exclude osteopathic boards of specialty.

6340a, 548 F.Supp. at 1061.

On October 28, 1982, the Hospital and the Staff appealed from this injunctive order. 6349a. That appeal is No. 82-3507.

Pursuant to the September 30, 1982, decision, and consistent with its conclusions of law, the district court entered a Judgment on Special Verdict. 6341a, 548 F.Supp. at 1062. That judgment was later, on November 18, 1982, determined by the district court to be final pursuant to F.R.Civ.P. 54(b). The court expressly determined that there was no just reason for delay in entering final judgment. The court directed the entry of final judgment, which was entered that day. 6351a-6356a.

Thereafter, on December 9, 1982, the Hospital, the Staff, and defendants Bauer, Butler, Deisher, and Kushner filed their notice of appeal, No. 82-3580. 6359a. On December 13, 1982, plaintiff Weiss filed a notice of cross-appeal, No. 82-3581. 6360a.

By Order entered January 31, 1983, this Court consolidated the three appeals, denied Weiss' motion also to consolidate the related pending mandamus proceeding (No. 81-2171), and designated the appealing defendants as appellants for briefing purposes.

II. Statement of Facts.

A. Introduction.

York Hospital is a non-profit community hospital located in York, Pennsylvania. It is governed by a Board of Directors composed of lay leaders from many various aspects of the York community. 4215a; 4454a.

Also located in the York metropolitan area is Memorial Osteopathic Hospital ("MOH"). This is another general hospital located a few miles from York Hospital.

Traditionally, osteopathic and allopathic physicians have been and are separately schooled and licensed by the Commonwealth of Pennsylvania and other states. In

1974, upon recognizing that the traditional differences in the schooling of D.O. and M.D. physicians were no longer substantial, York Hospital voluntarily amended its corporate charter to permit osteopathic physicians to obtain staff privileges. 3806a-3807a; 3810a-3811a. In 1976, after careful study of a number of proposals, the York Staff amended its by-laws to accomplish that result. 3813a-3814a; 4024a-4025a.

The events in this case arise out of the 1976 application for York Hospital staff privileges by plaintiff Weiss, a general (or family) practitioner in private practice in the York area. Before his application was even considered, Weiss threatened that he would sue if the application were rejected. 4876a.

In 1977, it was rejected. After he requested "reactivation" of the application, it was again denied in March, 1979.

The threatened litigation is now before this Court on these consolidated appeals. His claim is that the denial of his application resulted from a discrimination against osteopaths.

The district court found as fact that, since 1976, eight osteopathic physicians have applied for Staff privileges, and six were accepted, while a seventh application is dormant, awaiting supplementation by the physician.

It is undisputed that, *of these eight, only one — Dr. Weiss' — has been rejected*. In fact, on the very same day that Weiss' application was first denied, another osteopath was accepted for staff privileges.

B. Procedures for Application for Staff Privileges.

Consideration of the Weiss application followed the routine procedure at York Hospital for the processing of applications for staff privileges. 1542a-1555a; 4213a.

After the initial background and reference information on an applicant has been gathered, that review proceeds along the following sequence. First, an evaluation of the application must be provided by the chairman of the Hospital department in which the applicant seeks

privileges.[4] In some instances, such as the Family Practice Department, the department chairman selects a departmental credentials committee to assist the chairman in formulating the evaluation. Then, the Staff Credentials Committee reviews the application and related file and formulates its recommendation to the Staff Medical Executive Committee. 3816a-3817a; 5961a. Upon receiving the recommendation of the Staff Credentials Committee, the Medical Executive Committee independently reviews the application and related file in light of the Credentials Committee recommendation. 3817a-3818a; 5961a. The Medical Executive Committee — based on the applicant's education, experience, professional and non-professional moral and ethical character, loyalty, and performance — then formulates its recommendation on the application to the Hospital's Board of Directors. Exhibit ("Exh.") D-12, 5961a.

The Hospital Board of Directors routinely refers the application to its standing Medical Affairs Committee which is composed of representatives of the Hospital administration, the Staff Medical Executive Committee, and the Board of Directors and is chaired by a member of the Board of Directors. 3821a. The Pennsylvania Department of Health specifically mandates that, under certain conditions, decisions on staff privileges *must* be reviewed by such a committee. 28 Pa. Code §§103.4(6), 107.5(b)(5). The Medical Affairs Committee usually recommends a disposition of the application. 3821a.

After consideration by its Medical Affairs Committee, the Board of Directors has complete, plenary authority to decide whether to accept or reject an application; all decisions on the application by the department, the Staff Credentials Committee, the Medical Executive Committee, and the Medical Affairs Committee are merely recommendations. 3811a-3812a. Again, in accor-

4. At York, like any general hospital, a physician is only granted staff privileges in such department or service as his or her qualifications, including specialty, warrant. Based on experience and training, such privileges may require more or less supervision by others in the same department. 3802a-3805a.

dance with state regulations, the actual final decision on the application is made by the Hospital Board of Directors. 28 Pa. Code §107.5(a).

At any stage of the process prior to the ultimate decision by the Board of Directors, the committee considering the application may request of the applicant, the Hospital's Medical Affairs Department, or another committee that additional information be provided.

Either before or after an application is brought to the Hospital Board of Directors, the applicant is informed in writing of any adverse recommendation of the Medical Executive Committee or decision by the Board, as the case may be. 3822a; 5961a. The applicant may, at that point, request and obtain (i) a written statement of the reasons for the recommendation and (ii) the impanelling of a judicial review committee composed of physicians who have had no part in the consideration of the application to that point. The judicial review committee is required to hear testimony and receive other evidence to determine whether the adverse recommendation on the application was in error, unreasonable, arbitrary, or capricious. The applicant is entitled to attend the hearing, to be represented by counsel, to call witnesses and introduce evidence, to cross-examine and impeach witnesses, and otherwise to rebut evidence against him or her. The hearing proceedings are to be stenographically transcribed, but the judicial review committee is not bound by strict rules of evidence. Exh. D-12, 5961a-5965a.

C. The Application of Plaintiff Weiss.

Plaintiff Weiss applied for Staff privileges in the Family Practice Department of York Hospital. His application indicated that he already had staff privileges at MOH. Even before Weiss' application had been considered by any of the York committees, he informed Dr. Bauer, "you know if I don't get accepted, I'm going to sue." 4876a.

At about the same time, Michael Zittle, D.O., another general or family practitioner in private practice, also applied for staff privileges in the same department. 4057a. Weiss and Zittle were the first two osteopathic physicians to apply for staff privileges at York.

In accordance with the procedures outlined above, the chairman of the Family Practice Department on January 17, 1977 recommended acceptance of the Weiss application. 4065a. References thereafter received by the Hospital concerning Dr. Weiss were conflicting. Supportive letters of reference were received from both allopathic and osteopathic physicians. At the same time, information critical of Weiss' medical competence and ability to work with others in a hospital setting was also received from physicians in both disciplines.

Specifically, the Weiss file contained the April 18, 1977 letter of Kenneth F. Woerthwein, M.D., who wrote, in pertinent part, as follows:

> I do not personally know Malcolm Weiss, but some of his patients, particularly those on Public Assistance have since transferred to our office. They complained that he would make diagnoses about their children which did not seem to be founded. True enough, on physical examination, these children did not have any of these physical problems, particularly iron deficiency anemia. They would also complain that he would be very superficial in his examination. Therefore, I would have strong concern regarding his medical abilities and competence.

Exh. P-53, 5911a. The file also contained the March 9, 1977 letter from G. Bradford Myers, M.D. This letter (Exh. P-45, 5923a-5924a) reported upon a confidential conversation Dr. Myers had with an osteopathic physician on the staff of MOH. The letter recounts that the reporting osteopathic physician

> was quite explicit and straightforward in his descriptions of Dr. Weiss. He claims that Dr. Weiss is

known throughout the Memorial Hospital staff as a "rebel" and one can always depend on him to disrupt a discussion or proposal. [The osteopath] reported that Dr. Weiss' practice is "90%" medical assistance patients, most of which whom [sic] are seen at a very fast rate. [He] claims that the majority of referrals . . . are on a symptom basis only, and that the patient has only rarely been examined to confirm or exclude the presence of pathologic conditions. [He] said that Dr. Weiss has a reputation of being interested primarily in making money, "certainly not delivering quality patient care."

A third letter in the Weiss file was from Roy O. Kammer, D.O. His April 16, 1977 letter stated, in pertinent part as follows:

I have known Dr. Malcolm Weiss for four years. He was not popular during his internship and seemed to perform his duties grudgingly.

There was ambivalence concerning his staff membership at Memorial Osteopathic Hospital and it took three meetings and much debate before his acceptance. I, personally, led the fight to grant him membership on the basis that we trained him in a public institution and, if we approved his training, we had no choice but to grant him membership. On this basis, he was approved.

He served as a paid member of the Emergency Room Staff. He related so badly to people of the lower socio-economic class that on occasion he was physically attacked by patients and family members. He demanded police protection or the right to arm himself. The administration felt this lack of rapport was his fault and terminated his contract.

* * *

At the moment, our By-Laws demand that all staff members attend all required meetings and serve on at least one major committee. I cannot con-

> ceive of a busy generalist fulfilling all of his obligations at both institutions unless provisions are made to waive such requirements.

Exh. P-52, 5909a-5910a.

Even the supportive letters in the Weiss file were unpersuasive. For example, Dr. Ivan Butler, a member of the Medical Executive Committee, explained that three letters from MOH administration were neither satisfactory nor helpful to the committee since each was vague, general, and inconclusive. 4617a; 4620a.

With regard to one of those letters Dr. Butler explained why it was "absolutely not" satisfactory:

> This again was an example of the stonewalling effect we were receiving. We wrote to Mr. Hostler who had been administrator of the hospital there for, I believe, twenty-some years, requesting information and in turn, received a letter from a man who had been there one month. It was of no help at all, or very little help.

4620a.

On June 30, 1977 the Hospital Board of Directors considered the recommendations of the Staff Credentials Committee and the Medical Executive Committee and that of its own Medical Affairs Committee. Based on its discussion of these recommendations, the Board of Directors voted to accept Dr. Zittle's application but to deny Weiss' application. 4130a; Finding of Fact 38, 6332a, 548 F.Supp. at 1053. Notice of the action of the Board of Directors on his application was sent to Weiss that same day, June 30, 1977.

On August 19, 1977, following meetings with Hospital officials, Weiss requested that his application be reactivated and hence reconsidered.

After again receiving the favorable recommendation of the Family Practice Department's Credentials Committee on the application, its chairman recommended that the reactivated Weiss application be accepted. 4139a.

In accordance with the York Staff By-Laws and established procedure, the renewed application was again brought to the Credentials Committee of the York Staff. By this time, the Weiss file contained not only the information previously gathered before Weiss' application was denied in June, 1977, but in addition a memorandum from R. J. Herman, M.D. 4136a. The memorandum (Exh. P-76, 5913a), dated November 3, 1977, related as follows:

> Today I talked to Mrs. Mange of the York office of the Pennsylvania Department of Public Assistance. She reported to me that they have a health screening program for the children of Welfare recipients. They have a contract with an organization to provide that health screening and Dr. Weiss is employed by that organization. The York office of DPA has had many complaints from patients about incomplete exams by Dr. Weiss and about his lack of rapport with them. The State Department of Health here in York also has had similar complaints.
>
> There have been no apparent problems with excessive or inappropriate prescriptions.

On February 28, 1978, the Staff Credentials Committee nevertheless voted (3 for, 1 against, 1 absent) to recommend to the Medical Executive Committee that the application be accepted. 4139a.

On March 6, 1978, the Medical Executive Committee voted to recommend to the Hospital Board of Directors that the application again be denied. The vote was 2 in favor of the Weiss application and 3 against. 4139a; Exh. P-90, 5897a.

At this time, the Executive Committee was composed of Drs. Gary Ardison, of the Department of Family Practice; Thomas L. Bauer, of the Department of General Surgery; Ivan L. Butler, of the Department of Neurosurgery; Jack A. Kline, of the Department of Internal Medicine, and Lois N. Kushner, of the Department

of Radiology, who chaired the committee. 4140a. These five physicians were named defendants.[5]

In accordance with the established practice of the Hospital, the recommendation of the Medical Executive Committee was then brought to the Medical Affairs Committee of the Hospital's Board of Directors. 4142a. This committee requested that the members of the Family Practice Department Credentials Committee, the Staff Credentials Committee, and the Staff Medical Executive Committee meet informally to attempt to reach a consensus on the application. The members of those committees then met on March 20, 1978, and informally voted on the Weiss application. The vote was 6 for denial of the application, 5 for acceptance, 1 abstaining, and 2 absent. 4143a.

The Medical Executive Committee then met on April 19, 1978 to re-reconsider Weiss's application and voted to recommend that the Hospital Board of Directors deny the application. The vote this time was 4 against appointment and 1 in favor. 4144a; Exh. P-93, 5901a.

Dr. Butler explained his vote change from favorable to Weiss's application to opposed. He testified:

> The main reason I changed my mind was, as you recall, I polled a number of members of that Family Practice at the joint meeting that we had, and discussed their feelings for voting for Dr. Weiss and was told by them that they were concerned about his personality and were voting for his admission to the hospital because of fear of a lawsuit. That was probably the final determining factor that caused me to change my mind.

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5. Two of these five, Drs. Ardison and Kline, were totally exonerated by the jury and subsequent court judgment below. The remaining three, Drs. Bauer, Butler, and Kushner, were found liable to Dr. Weiss (and not the class) only on a state law claim of interference with contractual relations. Thus, Drs. Bauer, Butler, and Kushner are appellants in No. 82-3580, whereas all five are appellees in No. 82-3581.

4602a.

On April 21, 1978, Merle S. Bacastow, Vice President-Medical Affairs of York Hospital, sent Weiss written notice of the April 19, 1978 recommendation of the Medical Executive Committee. 4145a-4146a. Upon being advised of the decision of the Committee to recommend denial of the application, Weiss requested and received a statement of reasons (Exh. D-10) why the Executive Committee recommended that the application be rejected. Weiss' status as an osteopathic physician rather than an allopathic physician was *not* a reason for the recommendation. Weiss also requested an appeal to a judicial review committee of the Staff, a procedure open to him under the Staff By-laws. 4146a.

A Judicial Review Committee was appointed, consisting of Drs. S. Philip Laucks, of the Department of Psychiatry; Howard H. MacDougall, of the Department of Family Practice; Iain L. MacKenzie, of the Department of Internal Medicine; John P. Whiteley, of the Department of Pathology, and Samuel W. Deisher, of the Department of Obstetrics and Gynecology, who chaired the committee.[6] 4147a. The Committee members had no first-hand knowledge of the Weiss application or the proceedings thereon prior to the impanelling of the Judicial Review Committee. 4752a; 4833a; 4842a; 4987a.

The Judicial Review Committee met on three occasions to take testimony and other evidence to determine, as provided by the York Staff by-laws, whether the recommendation that Weiss' reactivated application be denied "was in error, unreasonable, arbitrary or capricious." At each hearing session of the Judicial Review Committee, Weiss was present and represented by Counsel. 4754a.

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6. These five physicians were named defendants below. The jury and court judgment exonerated all of them on all claims except Dr. Deisher, who was found liable only to Weiss individually (but not the class) on an interference with contractual relations charge. He is an appellant in No. 82-3580, while all five are appellees in No. 82-3581.

As provided in the York Staff by-laws, Dr. Weiss was permitted alone or through counsel to call and examine witnesses, to cross-examine opposing witnesses, to impeach witnesses, and to rebut the evidence presented against him. 4755a-4756a; 4773a; 4987a-4988a. In fact, at the hearings, some of the negative references in Weiss' file quoted above were read aloud for Weiss and his counsel to hear. 4760a-4763a. Weiss then testified at the Committee's hearing after this information was disclosed to him. 4763a-4765a. A stenographic record of the three days of hearings was kept and transcribed. 4753a-4754a; 4988a; Exhs. D-68, D-69, 5984a, 5987a. All of Weiss' procedural rights were carefully spelled out in a two-page list of "Hearing Procedure" (Exh. D-27 5979a-5980a), which was provided to Weiss and his counsel (4775a-4776a). There was no objection raised to these procedures. 4776a.

After hearing the testimony and receiving all other evidence presented at the hearings, the Judicial Review Committee on December 28, 1978 determined unanimously that the position of the Medical Executive Committee against recommending Staff privileges for Weiss was not unreasonable, arbitrary, or capricious. 4152a. The Judicial Review Committee also determined, with one dissent, that the Executive Committee was not in error.

The dissenting member on this one issue, Dr. MacDougall, nevertheless testified that he believed that the president of MOH, Mr. Hostler, in his appearance before the Committee, "was evading the answers because he had not reviewed the record." 4849a. As a result of this apparent evasiveness, it was agreed that Dr. MacDougall, as a representative of the entire Committee, would review Mr. Hostler's file on Weiss. This took place at MOH with both Weiss and his attorney present 4850a. But Dr. MacDougall was not shown the entire file. 4850a. He described the selection process as follows:

> There was an obvious file on the other end of the table around Mr. Hostler, and certain parts of this file

> were taken out and given to Mr. Markowitz [attorney for Weiss]. Mr. Markowitz then passed some of those papers to me to see. Others he did not.[7]

4851a-4852a. This entire procedure was adopted with the agreement of Weiss' counsel. 4785a-4786a.

Thereafter, counsel for Weiss and special counsel for the Hospital submitted to the Board of Directors written briefs supporting and opposing, respectively, the application. The Hospital Board of Directors then held a special meeting at which presentations were made by counsel for Weiss and special counsel for the Hospital. 1690a-1693a.

On March 13, 1979, the Hospital Board of Directors, having reviewed the recommendation of the Medical Executive Committee and the Judicial Review Committee, voted to deny Weiss staff privileges at the Hospital. The vote was 14 in favor, 0 opposed, and 2 abstentions.[8] 1690a-1693a. At trial plaintiff chose not to call any of the directors to testify.

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7. One of the documents disclosed only during trial was a June 17, 1976 memorandum (Exh. D-76, 6006a) contained in Mr. Hostler's file. Attached to the memorandum are reports by several nurses of incidents involving unprofessional conduct by Weiss at MOH. This conduct included loud, threatening, and abusive language directed at nurses in front of hospital visitors (6007a-6008a), screaming and cursing at nurses in front of patients and visitors (6009a), and disregard for patients' needs. One report dated June 16, 1976 states:

> Patients request nurses to deliver messages to Dr. Weiss when he makes his rounds — for example "Please make sure he sees me when he gets here," "I need a stronger pain pill," "Ask him if I may have a sleeping pill order." His reply when messages are delivered to him are always "Ah screw him/her."
>
> [Signature]

6011a. Despite the obvious relevance of this memorandum, particularly in light of Weiss' testimony that he had had no incidents at MOH since 1970 (3501a-3502a; 5169a), the district court precluded the document and its contents even for impeachment purposes. 5171a.

8. Only one of these directors, Director Angelo, is a physician.

In sum, the application came to the Board of Directors having evoked (1) opposing votes among the committees considering it; (2) an informal vote of 6 for denial, 5 for acceptance, and 1 abstention at the joint meeting called for the purpose of attempting to develop a consensus; (3) less than unanimous votes by the Staff Medical Executive Committee, and (4) a dissent in his favor by the family practice member (presumably a competitor of Dr. Weiss) of the Judicial Review Committee.

Each member of the Medical Executive Committee, the Judicial Review Committee, and the Board of Directors gave an affidavit[9] or testimony on both that he or she was not influenced in the various votes by the fact that Weiss was an Osteopath. 1733a-1742a; 4773a; 4835a; 4843a; 4853a; 4868a; 4879a; 4902a; 4990a.

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9. In the opinion denying defendants' motion for summary judgment, the district court reasoned that

> while the summary judgment rule allows for the use of affidavits in order to establish that there is no triable issue of fact, the party submitting the affidavits must also establish that the affidavits are true.

2242a, 524 F.Supp at 437.

ARGUMENT

I. *LAWLOR* AND *MAZUS* REQUIRE A DEMAND OR APPLICATION FOR STAFF PRIVILEGES BY EACH CLASS MEMBER.

In its essence, this case is based upon a claimed wrongful refusal to deal. This was repeatedly acknowledged by the district court and in fact alleged in the Amended Complaint, ¶¶26, 27, 196-197a. At trial, the only specific conduct by defendants alleged to be anti-osteopathic was the denial of staff privileges to plaintiff Weiss individually.

In this circumstance, the law of this Circuit is clear. Where the claim is based upon an unlawful refusal by defendant to deal with plaintiff, that plaintiff — and hence each class member — must allege and prove a demand which the defendant rejected. *Lawlor v. National Screen Service Corp.*, 270 F.2d 146, 154 (3d Cir. 1959), *cert. denied*, 362 U.S. 922 (1960) ("*Lawlor*"); *Mazus v. Department of Transportation*, 629 F.2d 870 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981 ("*Mazus*").[10]

The law clearly holds that people, like the class herein, who do not take the first minimal step of filling out and submitting an application form, cannot recover under the antitrust laws as a matter of law.[11]

Plaintiffs in *Lawlor* had filed both Sherman Act §1 and §2 counts, for both damages and injunctive relief.

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10. The scope of the Court's review is thus plenary, since the district court erred in formulating and applying the correct legal principle. This Court has already determined, and it thus is law of the case, that *Lawlor* is "a precedent relevant to the applicable substantive antitrust law" and that *Mazus* is "an analogous Title VII case." *DeMasi*, 669 F.2d at 118.

11. Particularly is this so where state law requires the use of an application in a form to be prescribed by the hospital. Nevertheless, the district court refused to decertify the class and denied motions for summary judgment, for directed verdict, and for judgment notwithstanding the verdict, all of which are presented in these appeals. See Parts II and VII below.

This Court held that, because plaintiffs had never attempted to obtain licenses from defendants, they were foreclosed from any relief under any of their counts.

As the Court stated in *Lawlor*, 270 F.2d at 154, quoted in *DeMasi*, 669 F.2d at 118,

> In the absence of such demand upon the part of plaintiffs, the courts have consistently held that there can be no recovery in an antitrust action.

Indeed, both before and since *Lawlor*, the courts have consistently applied the demand-refusal requirement as a condition precedent to recovery under the antitrust laws. See, *e.g.*, *Cleary v. National Distillers & Chem. Corp.*, 505 F.2d 695, 697 (9th Cir. 1974); *J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.*, 212 F.2d 840, 845 (2d Cir. 1954); *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561, 568 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *Windy City Circulating Co., Inc. v. Charles Levy Circulating Co.*, 550 F.Supp. 960, 964 (N.D. Ill. 1982).

This Court has repeatedly recognized the continuing vitality of *Lawlor*. *DeMasi*, 669 F.2d at 118; *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 150 fn. 17 (3d Cir. 1981). In *Fleer Corp.*, the Court followed the reasoning of *Lawlor* which "stressed that the plaintiffs had never attempted to compete with National Screen by obtaining their own exclusive licenses . . . ." 658 F.2d at 150 n.17. In other words, in both *Fleer* and *Lawlor* the plaintiff failed to seek (by applying for it) the right it claimed was foreclosed to it. This requirement is one of fairness: How can a defendant be fairly charged with refusing to deal with the plaintiff if the latter has never even demanded such dealing?[12]

The requirement is also one of Pennsylvania state law. State Health Department regulations (28 Pa. Code

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12. The requirement is thus akin to the exhaustion of administrative remedies doctrine. *See Weinberger v. Salfi*, 422 U.S. 749, 764-765 (1975) (dismissal of class claims required where only the class representative had exhausted administrative remedies).

§107.2) require that a hospital's medical staff be limited to those who have applied pursuant to the hospital and staff by-laws. While Weiss applied on the prescribed form (5918a), it is undisputed that there is no class member who applied and was rejected. Hence no class member was eligible for York staff privileges.

These authorities and the general principle that a demand is required were vigorously and repeatedly presented to the district court. 177a-179a; 1743a-1745a; 1763a-1765a; 2592a-2606a. Without addressing them in any of its class action opinions, the trial court instead concluded that "this case is sufficiently analogous in purpose to a civil rights case" so that "a strict application . . . of the numerosity requirement is unwarranted." 1513a. Yet, that approach disregards this Court's comparable holding in *Mazus* that a demand (there in the form of an application) is essential to a civil rights claim of discriminatory hiring and promotion.

Specifically, in *Mazus*, the Court affirmed a refusal to certify a plaintff class. In language remarkably appropos this case, Judge Rosenn wrote for the Court:

> In this case there was no evidence that any other female ever applied for a roadworker job with PennDOT and was rejected. The statistical evidence is ambiguous at best. In sum, there is no evidence from which this court can conclude that the district court abused its discretion in failing to certify a class.

629 F.2d at 876, quoted in *DeMasi*, 669 F.2d at 118. Although there was ambiguous evidence on the class issue in *Mazus*, in this case there was *no evidence* of denial of York Hospital staff privileges to any other osteopathic physician beside Weiss. In fact, the uncontested facts establish that Weiss was the *only* osteopath to have applied for but been denied such privileges. 6332a, 548 F.Supp. at 1053.

Since the refusal to deal claim by Weiss requires an application followed by a rejection, this case is comparable to *Alexander v. Gino's, Inc.*, 621 F.2d 71 (3d Cir.

1980). There the Court affirmed the finding, reached in the absence of any evidence of other persons with claims comparable to plaintiff's, not "that the class was too small but that the plaintiff had failed to even show that one existed." 621 F.2d at 75.

As these cases amply demonstrate, given the uncontested fact that Weiss is the only osteopathic physician who applied for staff privileges but was turned down, the district court erred as a matter of law and totally abused its discretion by concluding — essentially in deliberate disregard for this Court's holdings in *Lawlor* and *Mazus*[13] — that plaintiff had established a claim for relief for the class sufficient to defeat motions to decertify the class and for summary judgment, directed verdict, and j.n.o.v.

In *DeMasi*, this Court denied extraordinary relief of mandamus, saying,

> The contention may also be raised again before the district court as it exercises its continuing responsibility to supervise the class under Fed. R. Civ. P. 23(c).

DeMasi, 669 F.2d at 118. Accordingly, a motion to decertify the class was filed in the district court, asserting this "demand" requirement and other issues. 2592a-2606a. Nevertheless, the district court denied the motion in an opinion which is totally silent as to this issue but instead merely states:

> The other arguments presented by the Defendants, having previously been fully considered by the Court. *See* Weiss vs. York County Hospital, No. 80-0134, slip op. (M.D.Pa. May 28, 1981), will not again be reviewed on the Defendants' motion for decertification of the class.

3229a. Yet, the cited opinion of May 28, 1981, nowhere

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13. See discussion, in the next paragraph, of the Motion to Decertify the Class and footnote 14 *infra*.

mentions *Lawlor* or *Mazus* or discusses the "demand" requirement.[14] 1505a-1524a.

II. CLASS CERTIFICATION IS IMPROPER IN THIS CASE.

A. Plaintiff Could not Establish Numerosity, Commonality of Issues, or General Application to the Class of Defendants' Alleged Conduct.

For the reasons discussed previously concerning *Lawlor*, *Mazus*, and the state law requirement that a physician submit an application for staff privileges (see Part I above), plaintiff could not and did not establish the requisite class numerosity, F.R.Civ. P. 23(a)(1)[15]; commonality of issues, Rule 23(a)(2), or the general applica-

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14. This was a repeated refusal by the trial court to recognize the binding authority of *Lawlor* and *Mazus*. Having earlier discussed the application of those decisions in briefs filed before and at the class action hearing, defendants reiterated them and the requirement of a demand in connection with the motion to vacate and reconsider the class certification. 1743a-1752a. The district court denied the motion to vacate and reconsider, stating that the arguments had "almost without exception . . . already been considered by this Court." 2116a. The court did not, however, address these cases and the "demand" argument. *Id.* Given the district court's total refusal to consider *Lawlor* and *Mazus*, even after this Court's opinion in *DeMasi*, defendants respectfully suggest that, in the event any issue is remanded, the case be assigned to a different district judge in the exercise of the Court's supervisory powers. *Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir. 1982).

15. To the extent the district court identified any factors bearing on "numerosity," those factors militated *against* class certification. These factors are "geographical distribution of the purported class members, difficulty in identifying individual members, and the inconvenience of joining all individual members . . . ." 1513a. Since the issue is whether the class is so numerous that joinder of individual members is not practicable, the geographical concentration of all purported class members in a portion of one county, the fact that all class members can be identified with "minimal effort" (1507a), and the fact that the class numbers no more than about 90 individuals (*id.*) who could obviously be joined with minimal inconvenience to plaintiff and the court all militate *strongly* against a finding of the requisite numerosity. The court did not cite or explain

tion to the putative class of the defendants' alleged conduct. Rule 23(b)(2). The scope of the Court's review is thus plenary because, in purporting to exercise discretion, the court below erred in formulating and applying the correct legal precept. As the Court explained in *Scott v. University of Delaware*, 601 F.2d 76, 84 n.14 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979) ("*Scott*"), only after it is clear that the district court properly determined the legal issues is its decision applying those principles subject to review for abuse of discretion.

B. Plaintiff is Neither Adequate Nor Typical as a Class Representative.

This Court described Weiss' experience as "unique." *DeMasi*, 669 F.2d at 116.

There are obviously two disparate groups subsumed in the class certified below: the osteopathic physicians who have not applied for staff privileges, allegedly dissuaded by fear, and the one applicant who applied and was rejected.[16] Under the Supreme Court's recent decision in *General Telephone Co. of the Southwest v. Falcon*, — U.S. —, 50 U.S.L.W. 4638 (U.S. 1982) ("*Falcon*") and *Scott*, *supra*, Weiss could not be the class representative for the former group, and the two groups could not be encompassed in the same class. The district court abused its discretion,[17] therefore, in certifying a class and in denying defendants' motion to decertify after *Falcon* was decided.

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what factors support such a finding of ultimate fact or conclusion. Further, the court's refusal to reconsider the class issue came after plaintiff served subpoenae upon over 100 M.D. physicians, thus amply demonstrating an ability to accomplish joinder of the smaller number of D.O. physicians without undue inconvenience. *See DeMasi*, *supra*. *Cf. In re Anthracite Coal Antitrust Litigation*, 78 F.R.D. 709 (M.D. Pa. 1978) (Muir, J.) (class of 141 entities throughout the state *denied* on numerosity grounds).

16. The class was also improperly defined to include all osteopaths in the region, including those who *were* admitted to the Staff.

17. The scope of the Court's review of this issue is whether the district court abused its discretion. *Scott*, *supra*.

In *Falcon*, the Supreme Court held that the plaintiff, an employee who was denied a promotion, was not an "adequate" or "typical" class representative of job applicants who were not hired. The Court explained that there is "a wide gap" between an individual's claim of discrimination and the existence of a Rule 23 class of persons who have suffered "the same injury" as that individual. 50 U.S.L.W. at 4641. The Court expressly rejected an "across the board" theory by which a plaintiff who suffered one kind of injury as the result of alleged discrimination could represent a class of people who suffered a different kind of injury allegedly because of the same discrimination.

Weiss has made precisely the untenable "across the board" assertion found impermissible in *Falcon*. Yet, at the same time, he has emphasized the factual, legal, and conceptual gulf that separates all non-applicants from himself:

> . . . denial of staff privileges is an event which, in and of itself, so besmirches the professional reputation of a physician that he is certain to lose business on account thereof. Thus, osteopathic physicians are directly injured by defendants' unlawful policy. If they fail to apply for privileges, they will suffer economic harm and if they apply for privileges, they will suffer economic harm.

Brief for Respondent Malcolm Weiss, filed October 22, 1981 in *DeMasi*, pp.25-26 (citations omitted).

It was critical for Weiss to prove that *each* non-applicant class member was *in fact* "dissuaded by fear" rather than choosing not to apply for other reasons. Clearly, proof of each non-applicant's dissuasion by fear is inherently individualized, and not appropriate for common proof. See *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1226 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976). Worse yet, proof that Weiss was not dissuaded but in fact applied in 1976 and reactivated his application in 1977 directly conflicted with his obligation

to prove that class members were disuaded from applying.[18] The district court acknowledged this conflict by insisting, over defendants' objection, upon submitting the claims of Weiss and the class to the jury separately.[19] 5737a-5738a; 6236a-6277a. Yet the Court held in *Scott* that a proper class representative must suffer no impairment in his "incentive . . . in vigorously prosecuting *all* aspects of the case." 601 F.2d at 85 (emphasis supplied).

Futhermore, the kind of claimed injury is necessarily different for Weiss and the class: for Weiss, the alleged harm was actual refusal resulting in a "besmirching of professional reputation."[20] In contrast, for the remaining, supposedly "dissuaded" osteopaths, it necessarily was business foregone. They could not possibly show any "besmirching of reputation." Yet *Falcon* and this Court's decision in *Scott* hold unequivocably that a class representative must be part of the class *and suffer the same injury* as the class members. 50 U.S.L.W. at 4640; 601 F.2d at 86-89.

For the foregoing reasons, the class in this case must be decertified.

III. THERE IS NO CREDIBLE EVIDENCE OF IMPACT OR ANTITRUST CAUSATION AS A MATTER OF LAW.

At the threshold, before considering whether there were violations of Sherman Act §§1 and 2 established on this record, it is essential to recognize a fatal deficiency in plaintiff's case: he completely failed to establish impact, injury, fact of damage, or causal connection to an

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18. Only about one-third of the class has indicated a claim for damages in response to a post-trial notice to the class. 46a. At trial, no attempt was made to show dissuasion as to each class member.

19. Incredibly, the jury actually found facts favorable to the class, but not Weiss individually, as to a Sherman Act §1 claim. See Part IV.

20. While Weiss is unique in this regard, seven other osteopathic physicians applied for the staff privileges denied him. 6332a, 548 F.Supp. at 1053.

antitrust violation for himself or class members, by any credible, non-speculative, non-conjectural evidence. Accordingly, the judgment in favor of the class under §§1 and 2 and in favor of plaintiff Weiss under §2, must be reversed. As a matter of law, this is subject to the Court's plenary review.

Section 4 of the Clayton Act, 15 U.S.C. §15, requires a private antitrust plaintiff to prove an "injury" in his "business or property" "by reason of anything forbidden in the antitrust laws." This has translated into a requirement that there be concrete "injury in fact" which is proved by a preponderance of the evidence to have been "caused by" the violation. Both the impact (or fact of injury) and the causal connection must be proved with a fair degree of certainty, and without speculation or conjecture. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 104-105 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); *Rea v. Ford Motor Co.*, 497 F.2d 577, 589 (3d Cir. 1974), and cases cited at n. 25; *Deaktor v. Fox Grocery Co.*, 475 F.2d 1112, 1117 (3d Cir. 1973). *Accord, State of Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 317 (5th Cir. 1978). As Judge Adams stated for the Court in *Pitchford*, 531 F.2d at 105, "It is not sufficient to show fact of damage by mere speculation or guesswork." The same is true in suits for injunctive relief. *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 n.2 (3d Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

And in *Blue Bird Body*, 573 F.2d at 327, the court recognized that "impact is a question unique to each particular plaintiff and one that *must be proved with certainty*." (emphasis supplied)

Neither plaintiff nor class members established such impact at trial.

Plaintiff Weiss's First Amended Complaint at ¶32 (199a) boldly stated the various types of economic harm and injury that would be proved:

> 32. The contract, combination, and conspiracy so formed, and the acts and practices in furtherance

> thereof, have directly and proximately caused injury to the plaintiff and the members of the class in their business, trade, and property, *by causing them to suffer lost profits, diminished cash flow, loss of patient business, loss of goodwill, reduced income, and other forms of economic harm and injury.* (emphasis supplied)

However, none of these was proved for either Weiss or any class member.

A. Plaintiff Weiss

Dr. Weiss' theory of why he suffered injury requires an understanding of his role as a general practitioner.

Weiss was and is in private practice. At the time he applied to York, he stated he had a caseload of 225-250 patients per week. 3558a; Exh. P-16, 5918a.

Weiss had (and has) staff privileges at MOH. If one of his private patients needed hospitalization, he could and did admit his patients there. The record shows that MOH had, with a few limited exceptions, comparable facilities with York Hospital for most normal hospital services, such as general surgery.

In some cases, a patient Weiss had treated was instead admitted to York Hospital. This could happen in several ways. An accident victim might be taken to York's emergency department by ambulance. 3462a. Or a specialist to whom Weiss referred a patient could admit the patient to York. 3559a. Or the patient might simply prefer York as an institution and ask to be admitted there by another general practitioner with admitting privileges.

Weiss claimed economic injury on the following three grounds. First, he believed that he could not treat at York Hospital those of his patients who were admitted there. For example, if one of his patients had to undergo open-heart surgery, although as a family practitioner he obviously could not perform the operation whether or not he had staff privileges (5243a-5245a), "I would be there to hold the patient's hand, to reassure him. He's

about to undergo a terrible thing, and he knows me, not his heart surgeon." 3571a.

However, he testified that nothing prevented him from visiting his patients at York and reassuring them (and billing them for such reassurance) whether or not he had staff privileges. *He admitted he had never attempted to do so.*

Q: You can visit the patient at [York] hospital, can't you?

A: *I could visit the patient.*

Q: Isn't it true that because you are a doctor that there are no specific hours to which you are limited to visiting that patient?

A: It's my understanding that I'll have to make arrangements and somebody will have to tell the nursing staff to open the doors to Dr. Weiss. I just can't walk in. I think I'll be challenged.

Q: You think you will. Have you ever tried?

A: *Not at the York Hospital* but at other hospitals.

Q: You mean once your patient was put in the York Hospital, you never visited one patient that was put into York Hospital?

A: No. I do not go to the York Hospital.

3573a-3574a (emphasis supplied). He also claimed the York emergency department did not call him to assist in emergencies, whereas MOH did. 3578a. He admitted, however, that even were he put on the staff at York, MOH would remain his "primary" hospital. 3628a.

His second claimed injury was a supposed loss of patients following their stay at York. He claimed that following their discharge, some patients did not return to him as their family physician, but instead went to physicians whom they had met while they were hospitalized at York, or to whom they were referred, he claimed, by the specialists at York. 3545a. No such former patients

were called to explain the circumstances of their not continuing in Weiss' care.

Third, he opined that his reputation was damaged by not receiving staff privileges at York. He did not testify he had in fact suffered such harm, but rather that "the word *is going* to leak out" that his application was denied. 3538a. He was rejected in March, 1979, and testified in August, 1982.[21]

In apparently attempting to establish his fact of injury from the above, Weiss put into evidence, without further elaboration, his gross and net income from medical practice for the years 1976 through 1980:

	Gross Medical Income From Private Practice	Additional Medical Employment Income	Net Medical Income
1976	$124,669.45		$84,628.84
1977	$122,562.74		$72,414.00
1978	$113,728.20	$8,000 (at York County Prison	$65,881.61
1979	$123,409.45	$9,600 (at York County Prison)	$72,261.82
1980	$125,834.92	$10,900 (at York County Home)	$58,235.28

3646a-3648a; 5978a; 5982a-5983a.

In other words, his gross income from medicine increased from $122,562 in 1977 (in June of which his application was first rejected) to $133,009 in 1979 (in March of which his application was rejected for a second time) to $136,734 in 1980. His net income fluctuated amidst this steady increase. It was high in 1979, the year his application was rejected for the *second* time. There was no testimony explaining the decline in net income in 1980, while gross increased, or connecting it in any manner with the claimed violation, as opposed to rising costs or other explanations.

He did not testify whether his 225-250 patient

21. Plaintiff withdrew any claim of defamation following the close of the evidence. 5525a.

caseload per week in 1976 had increased, decreased, or remained the same in subsequent years, or why.

A rational jury, therefore, could not conclude that there was injury in fact or causal relationship proved without "speculation and guesswork."

In *Bigelow, supra*, the Supreme Court emphasized that "the jury may not render a verdict based upon speculation and guesswork." 327 U.S. at 264. Rather, the jury must be able to conclude (*id.*; emphasis supplied):

> As a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, *and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes*, that defendants' wrongful acts had caused damage to the plaintiff.

Here, as in *Rea v. Ford Motor Co.*, 497 F.2d at 589, the record provides no rational support for a determination, even by way of inference, that the defendants' actions caused any injury to the business or property of plaintiff. There was no evidence that plaintiff incurred greater operating expenses, lost sales, or lost profits because of the conduct of defendants. Similarly, as in *Deaktor v. Fox Grocery Company*, 475 F.2d at 1117, "plaintiff's causation theory was conjectural" and "the evidence concerning causation was speculative."

For the foregoing reasons, plaintiff failed to establish any impact, injury, fact of damage, or causal connection between himself and the antitrust claims he made. The judgment in his favor under Sherman Act §2 must therefore be reversed.

B. The Class

But whatever deficiencies plaintiff's own case encountered were dwarfed by the magnitude of the failure of proof as to all other class members.

There are 92 class members. Only four of them testified.

Dr. Charles Hash, a surgeon, testified that, *were* he to apply to York (which he had not), and *were* his application to experience what he described as "the long drawn out ordeal that Dr. Weiss had had in his application" then in that hypothetical eventuality:

> I think it *would* hurt my practice. It would certainly hurt my reputation. It *would* have many adverse effects upon my livelihood.

3602a.

He did not testify that any such thing *had* occurred. The law requires an injury in fact. It does not permit recovery for hypothetical "woulds."

He further testified about two incidents where he referred a patient to an M.D. physician and "never heard from the patient again." 3640a. He made no attempt to explain why this occurred or to link this incident with the claimed antitrust violation.

The second class member was Dr. Kieren Knapp, a general practitioner like Weiss. His testimony was merely that when he referred patients to specialists at York, he did not always receive reports back which he would have liked to receive. 3747a. He did not link that causally with the supposed antitrust claim or testify to any diminution of income or other cognizable injury.

Dr. Mark Illfelder, an osteopathic gastroenterologist and internist, testified that defendant Butler and his two professional colleagues declined joining the neurosurgical staff at MOH because they had a highly developed team and system for providing neurosurgery at York. "They didn't feel that they could provide the same kind of service" at MOH. 3772a.

In what manner is this incident, based upon sound considerations of medical practice, logically connected with any conceivable injury claimed by class members?

The last class member to testify was Dr. Jacques Surer, an osteopathic ophthalmologist. He testified he had "never sought privileges at the York Hospital." 3779a. Like Dr. Hash, he did not testify that he *had in fact* suffered any injury — rather, he conjectured he

"would" suffer such *if* he applied and *if* his application were twice rejected in the manner of Dr. Weiss. 3780a. Even though some of his patients referred to M.D.'s do not come back, he did not link this with any claimed violation of the antitrust laws. Quite the contrary, he testified he had a "very good rapport" with M.D. opthalmologists on the York Staff, and did joint consultations with several of them. 3790a.

Plaintiff's expert failed to furnish one iota of further evidence as to the injury supposedly sustained by class members. 3880a. He admitted he had made no study of plaintiff himself (3934a), let alone of any or all of the 92 class members.[22]

Despite the complaint's averments, there was no proof of "lost profits," "diminished cash flow," "loss of patient business," "loss of goodwill," "reduced income," or "other forms of economic harm and injury," nor any casual relationship between such and any claimed antitrust violations.

The requirement of *Bigelow and other cases* cited above is that *all* antitrust claimants must prove that an antitrust violation is a material cause of some concrete economic injury, with a fair degree of certainty, without speculation and conjecture. Neither plaintiff in his own right nor on behalf of the class did so. Accordingly, the judgments in their favor under §§1 and 2 of the Sherman Act must be reversed.

IV. THE JUDGMENT AGAINST THE STAFF UNDER SHERMAN ACT §1 MUST BE REVERSED.

The judgment entered with respect to Sherman Act §1 holds only the Staff liable and only to the class. Plain-

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22. In *Deaktor, supra*, this Court found the more extensive evidence of injury presented there to be nevertheless inadequate. 475 F.2d at 1117 n.4. *A fortiori*, here, neither the plaintiff nor his expert nor the several class members offered any competent proof of injury.

tiff Weiss did not receive a judgment in his favor.[23] The jury found there had been no unreasonable restraint of trade with respect to Weiss himself. Further, neither the Hospital nor any of the individual defendants were found to have conspired with each other or with anyone.

The judgment in favor of the class was "molded" by the trial court from answers to special verdict questions. Those answers and the trial court's findings of fact thereon are insufficient as a matter of law to support the judgment in favor of the class, which must therefore be vacated. The Court's review is thus plenary.

A. The Medical Staff Cannot Conspire with Itself.

It is of course fundamental that there must be more than one "conspirator" to sustain liability under Section One of the Sherman Act. Unilateral action cannot suffice as a matter of law. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). As the Court has held:

> Unilateral action, no matter what its motivation, cannot violate §1 [of the Sherman Act].

Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 110 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). *Accord, H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 51 U.S.L.W. 3258 (U.S. October 4, 1982).

In this case, there is no plurality of actors. "The individual Defendants have *not* violated the antitrust laws." Conclusion of Law 5, 6340a, 548 F. Supp. at 1601 (emphasis supplied). The Hospital was found not to have been a conspirator. Under these circumstances, finding the lone conspirator to be "The York Medical and Dental Staff" is legally insufficient, for the following reasons.

First, the district court correctly charged that the Hospital and Staff are one entity as a matter of law.

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23. Thus, this discussion assumes but does not concede that class certification was proper. But see Part II.

> Thus I instruct you that York Hospital and the Medical and Dental Staff of York Hospital must be regarded by you as a matter of law as *a single entity* which cannot conspire with itself.

5685a (emphasis supplied).

Further, the Pennsylvania Department of Health regulations unequivocally command that the Staff is part of the overall Hospital institution and is required to be "accountable to the governing body," the Hospital Board of Directors. 28 Pa. Code §§101.31, 103.1, 103.4(9), 107.1.[24] Thus, the Staff is no more than an unincorporated division of the Hospital and inseparable from it. 5685a.

Second, there is no evidence in the record identifying any possible "co-conspirator." Here, the individual defendants and the Hospital itself were *all* exonerated.

With whom, therefore, did this "Staff" conspire? The District Court's finding merely states cryptically "another person or entity." Finding of Fact 8, 6330a, 548 F.Supp. at 1051. That mysterious "other person or entity" is never identified.

Third, even plaintiff's own expert witness testified that the economic reality of the matter was that the Hospital and the Staff functioned as "one economic unit," "one firm," and "one organization." 3852a-3853a.

The awesome weight of treble damages and injunctive relief in favor of a plaintiff class cannot, in fairness and consistent with due process, be supported by such an empty record. The judgment in favor of the class and against the Staff under Sherman Act §1 must be reversed.

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24. These and other pertinent portions of such regulations are set forth in the Addendum hereto.

B. The Class has No Claim for Relief Under *Lawlor*.

Assuming *arguendo* that class certification was proper in this case, the Staff was entitled to judgment in its favor as a matter of law under *Lawlor*. See the discussion in Part I above. Since Pennsylvania Department of Health regulations, 28 Pa.Code §107.2, mandate that the Staff "be limited to physicians and dentists who have made application in accordance with the bylaws," judgment against the class was also required as a matter of law[25] under the state action doctrine. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97(1980); *Parker v. Brown*, 317 U.S. 341 (1943).

The district court also erred in failing to charge, based upon *Lawlor*, that the jury cannot find a refusal to deal with any physician who did not apply for staff privileges. Defendants' exception to the charge on this point was denied. 5746a-5747a.[26]

C. There is No §1 Relevant Market.

For the reasons discussed in Part V, A below, plaintiff was required, but failed, to prove a relevant service market. *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d at 148 n. 13.

V. THE JUDGMENT AGAINST YORK HOSPITAL BASED UPON SECTION TWO OF THE SHERMAN ACT MUST BE REVERSED.

The judgment assesses liability in favor of both Weiss and all class members for violations of Sherman Act §2 (6341a, 548 F.Supp. at 1062). Only the Hospital

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25. This is equally true under §2 of the Sherman Act.

26. Further, the trial court erroneously gave a "per se" charge under Sherman Act §1 as to the class claim. 5689a-5691a. Hospital staff privileges cases of the type here presented are governed by the "rule of reason" standard. *Dos Santos v. Columbus-Cuneo-Cabrini Med. Center*, 684 F.2d 1346, 1352 (7th Cir. 1982); *Pontius v. Children's Hospital*, 552 F.Supp. 1352 (W.D. Pa. 1982).

was found liable. All individual defendants and the Staff were exonerated.

This judgment is devoid of that minimum quantity of evidence necessary to support it. Therefore, the judgment must be reversed.[27]

The Court below molded the jury's special verdict answers to assess liability against York under each of the three prongs of Section Two: (a) monopolization; (b) attempt to monopolize; and (c) conspiracy to monopolize. Conclusions of Law 2-4, 6339a-6340a, 548 F.Supp. at 1060-61. These are examined in order.

A. There is No Monopolization as a Matter of Law.

The offense of monopolization has been set forth by the Court recently as follows:

> The offense of monopolizing under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant product and geographic market and (2) the wilful acquisition or maintenance of that power as distinguished from the growth or development as a consequence of a superior product, business acumen, or historic accident . . . . Monopoly power may be defined as the power to control prices and exclude competition with respect to a particular product and within a particular geographic market . . . ."

Borough of Lansdale v. Philadelphia Electric Co., 692 F.2d 307, 311 (3d Cir. 1982) (emphasis supplied) ("*Lansdale*").

Plaintiff's expert witness, Dr. Frech, provided virtually the only evidence to support plaintiff's §2 claims. He failed to provide a *prima facie* case for plaintiff, and in fact established that plaintiff and the class cannot recover on those claims, for the reasons which follow.

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27. The Court reviews all issues presented in this Part under the plenary standard for legal error.

1. The Service Market Defined is Inadequate as a Matter of Law.

The "product market" is the narrowest market which includes all competing products, or in this case, services. Sullivan, *Antitrust* §12, p. 41 (1977); II Areeda & Turner, *Antitrust Law* §517, p. 346 (1980). However, plaintiff's market was a welter of dozens of different services which do *not* compete.

Robinson v. Magovern, 521 F.Supp. 842, 877 (W.D. Pa. 1981), *aff'd*, 688 F.2d 824 (3d Cir.), *cert. denied*, 51 U.S.L.W. 3340 (1982), represents the correct approach to market definition. There, an open-heart surgeon brought an antitrust action for denial of hospital staff privileges. The court held the correct service market was "adult open heart surgery," 521 F.Supp. at 878. The court found this to be a "distinct market" from even pediatric open heart surgery, because the latter is for the correction of congenital heart defects, and the former for acquired defects. Hence, different skills and equipment are necessary for each. *Id. Accord, Pontius v. Children's Hospital*, 552 F.Supp. at 1366 (pediatric open heart surgery different service market from adult open heart surgery).

In *Robinson*, the court held that the touchstone is to include "all products *that consumers perceive as a reasonable substitute for each other*." 521 F.Supp at 878 (emphasis supplied). The court followed this Court's analysis in *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 30 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978), that it is the "perceptions . . . of consumers which are most salient in the determination of market boundaries."

Here, in contrast, Dr. Frech included in the same product market the universe of *all* health care provided by *anyone*. In his words, the relevant market was: "hospital *health care* supplied by *the hospitals* and their *medical staffs*." 3851a (emphasis supplied). He elaborated that this would include "*many different services*, obviously." 3851a (emphasis supplied).

That is legally incorrect, and indeed an absurd definition. Clearly, hospital patients do not perceive all such health care to be in competition with and "reasonable substitutes" for one another. Even within the same hospital (let alone among different hospitals), a heart surgeon does not compete with a dermatologist, nor an opthalmologist with an obstetrician. A patient needing a coronary by-pass does not perceive an operation for a detached retina to be a "reasonable substitute."

Dr. Frech did not purport to buttress his conclusory opinion on any study or evidence of any kind that patients perceive all health care to be essentially fungible. This complete failure of evidence contrasts dramatically with *Columbia Metal Culvert*, *supra*, for example, where the plaintiff carefully supported its assertion that aluminum culvert and steel culvert are in separate markets. 579 F.2d at 28-30.

Dr. Frech's utter failure to support his product market definition, coupled with the inherent absurdity of the market when tested against common sense, leads to the conclusion that it cannot be a basis for a judgment of liability. Since the definition infects all of the claims under §2, that judgment must be reversed in its entirety.[28]

Dr. Frech's definition was curious. In the normal antitrust action, a plaintiff attempts to prove the narrowest possible market. *See, e.g., Columbia Metal Culvert*, 579 F.2d at 25 (defendant's market share was 80% if plaintiff's definition of only aluminum culvert were used, but only 10% if defendant's definition of both aluminum and steel culvert were accepted). Here, plaintiff chose a definition that swallowed the universe — nursing, outpatient care, speech therapy, pastoral care, neonatal facilities, open heart surgery, psychiatric services, gastroenterology, and dozens of others, were all lumped together.

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28 The faulty market definition also infected the judgment in favor of the class under §1, since this is a rule of reason, not a per se, case. See *Columbia Metal Culvert*, 579 F.2d at 26, n.9, and Part IV above.

By setting forth this multitude of different markets as one product market, plaintiff succeeded in accomplishing three goals: first, he had one "monopoly" target to aim at. Second, he hid the reality that his own class members were in many different product markets. For example, his class member witnesses at trial were one general practitioner like himself (Dr. Knapp), one general surgeon (Dr. Hash), one gastroenterologist (Dr. Illfelder), and one opthalmologist (Dr. Surer). Significantly, none testified that either he or his patients considered his services fungible with those of all other hospital personnel.

Third, Frech was able to conclude that York had an 80% "market share" by simplisticly taking the average number of patients at York and MOH and multiplying that by the number of days in the year. 3862a-3863a.

This fundamental error in definition tainted the jury's answers to all of the §2 claims, regarding monopolization, attempt to monopolize, and conspiracy to monopolize. Accordingly, for this reason, the judgment under §2 must be reversed.

2. There is No Credible Evidence of Monopoly Power.

The verdict must also be reversed because there is no credible evidence of monopoly power. The possession of such power is a necessary element in a §2 claim. *Lansdale*, 692 F.2d at 311.

Dr. Frech did not believe that either York or its Staff had monopoly power in its own right. Rather, he testified that they "shared" monopoly power. 3934a. The "shared monopoly" theory has been rejected by the courts. *See FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976) (shared monopoly is "nothing more than §1 claim under another name"); *FTC v. Lonning and Kellog Company*, 539 F.2d 202, 204 (D.C. Cir. 1976); *Consolidated Terminal Systems v. ITT World Communications, Inc.*, 535 F.Supp. 225, 228-29 (S.D.N.Y. 1982) (shared monopoly is "tautological" and "does not in itself violate §2 of the Sherman Act. Rather, in order to sustain a charge of monopolization or at-

tempted monopolization, a plaintiff must allege the necessary market domination of a *particular* defendant.") (emphasis supplied).

Monopoly power requires proof of either "the power to control prices" or "the ability to exclude competition" in the relevant product and geographic market. *Id.*

Dr. Frech did not even recognize the "ability to exclude competition" test at all, and refused to testify thereto. He repeatedly stated that as an economist he recognized one test alone for monopoly power: "the power to raise prices without losing all your customers." 3896a, 3933-34a.

Therefore, it was reversible error for the lower court to have instructed the jury that it could find monopoly power based upon "the ability to exclude competition" (5702a-5704a), and it was reversible error for the lower court to have submitted special verdict questions 18 and 19 to the jury, (6255a-6256a), which permitted the jury to find monopoly power from the "ability to exclude competition." There is no credible evidence whatsoever on this point in the record. See *Rea v. Ford Motor Co.*, 497 F.2d at 590, n.28 (verdict for plaintiff reversed under §2 for failure to prove ability to exclude competition).

Turning to the remaining test for monopoly power, the "power to control prices," on which Dr. Frech totally relied, he fundamentally misconceived that test. He testified that the standard was whether an entity could "raise prices without losing *all* your customers." 3896a; 3933a-3934a.

That is just as faulty as his definition of the "product market." Under his test, virtually every business entity in the United States since post-World War II inflation began, including every sole proprietor, possesses "monopoly power." Virtually all have "raised their prices." Virtually none has lost "all of its customers."

Under this test, every hospital in the United States, and indeed every doctor, possesses monopoly power. Frech testified that every single hospital in the United States possesses "monopoly power." 3896-97a. This means that all would be presumably subject to potential

criminal sanctions under §2, as well as injunctive and treble damage claims. Indeed, Dr. Frech carried his "analysis" to its wholly consistent but absurd conclusion that plaintiff Weiss himself, as one of dozens of family practitioners in York County, *also possesses monopoly power*. 3934a.

Frech's simplistic view, of course, is not what monopoly power means. The real issue in defining monopoly power is whether the alleged monopolist can control prices so as to reap monopoly, supra-competitive profit margins:

> The purpose for market definition in a monopoly case is to see whether the alleged monopolist has power to maintain a price substantially higher than costs (or, by lowering price to competitive levels, to drive others out). . . . One must know . . . *whether cross-elasticity is high at prices closely related to cost, or whether the alleged monopolist has a substantial cost advantage which enables it to set prices at supra-competitive levels before the discipline of substitutes sets in.*

Sullivan, *Antitrust* at §16, p. 56 (emphasis supplied).

Similarly, Areeda and Turner state:

> Market power is control over price—the ability to increase net revenues by restricting output and thus raising price above its competitive level. *The degree of market power is measured by the excess of the profit-maximizing price over short-run marginal cost.*

II Areeda & Turner, *Antitrust Law* §513, p.337 (emphasis supplied). In their view, there is no presumption of "substantial market power," let alone "monopoly power," unless the firm's prices have typically exceeded average variable costs by 50% or more for a substantial period of time, or the firm's return on investment has exceeded its cost of capital by 50% or more for a substantial period of time. *Id.* Vol. III §803, p. 291.

Yet Dr. Frech had no opinion on cross-elasticity;[29] no opinion on the relation of York Hospital's prices to its costs; no opinion whether York had a "substantial cost advantage which enables it to set prices at supra-competitive levels before the discipline of substitutes sets in." He offered no opinion on the index of costs facing York and every other hospital — from increases in energy costs to orderlies' wages — to determine whether price increases had been greater than cost increases. He did not know whether any price increase by the Hospital was the result of an exercise of "monopoly power" as he defined it.[30] Dr. Frech admitted he made no attempt to study York Hospital's, or MOH's, costs or profit margins. 3955a. Further, he found that price was "a small part of the reason" patients chose York over other hospitals. 3910a.[31]

3. There is No Credible Evidence of Misuse of Monopoly Power.

Plaintiff needed to demonstrate not just that defendants possessed monopoly power, but that there was

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29. He stated he could not answer any question on cross-elasticity of demand between York and MOH because he had undertaken a study which turned out to be an "impossible econometric exercise." Frech concluded, "What you are asking is the price elasticity of demand for the two different hospitals and it's very difficult to estimate that." 3897a.

30. Q: Do you have any study that shows whether York Hospital in fact raised its prices as an exercise of this monopoly power?

A. Well, I think that's basically unanswerable. 3955a.

31. Dr. Frech's theory of why York Hospital had the ability to raise prices was simply that *all* hospitals automatically have such ability because third party payors like the federal government under Medicare, and insurance companies, including Blue Cross, Blue Shield, and others, pay most of the bills. He made no attempt to explain the relationship of hospital prices or costs to hospital profit margins, nor to explain competition among the third party payors or the dynamics of cost reimbursement. He simply opined that "many of the consumers have insurance so they don't even care [about price]." 3862a.

"wilful acquisition or maintenance of that power as distinguished from the growth or development as a consequence of a superior product, business acumen, or historic accident." *Lansdale*, 692 F.2d at 311.

Plaintiff's and his expert's theory of monopolization was that York and its staff had available to them at the Hospital certain services and facilities that MOH did not have. Specifically, Frech testified that these included a CT scanner (which MOH actually had), open heart surgery, neonatal intensive care, monitored stroke unit, audiology, burn care, dental services, electroencephalography, family planning, genetic counselling, pastoral care, pregnancy termination, prosthetic services, and speech therapy. 3861a-3869a.

Frech concluded that "the fact that York has many of these facilities that Memorial doesn't, it means for certain types of consumers, York is just a monopolist and they really don't have the option of going to Memorial Osteopathic because it doesn't have a crucial service." 3869a-3870a.[32]

Significantly, Frech did *not* testify that York had ever misused its supposed monopoly power in overcharging patients for these facilities and services. When Frech was asked whether York had ever misused such power, he opined it was "unanswerable" as to whether York had ever raised its prices as an exercise of monopoly power. 3955a. Yet that was the only test of monopolization Frech recognized.

Nor did Frech testify that York had ever "misused" any monopoly power in acquiring or maintaining these services and facilities upon which he based his conclusion that York is "just a monopolist." Quite the contrary.

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32. It is not apparent that plaintiff has standing to pursue this theory that York had "misused" its monopoly power by acquiring services and facilities not found at MOH. That claim would appear to belong to MOH, not to plaintiff or any class members herein. In any event, plaintiff as a general practitioner (as were 75% of his class members) could not utilize these specialized services and facilities, and thus lacks standing for another reason. 3802a-3805a.

these services and facilities appear from his testimony to be the consequence of York's growth and development as a quality hospital providing the full-range of hospital care.

Frech testified that the special services or facilities available at York had resulted because federal and state regulations, designed to keep health care costs down, allocated certain services and facilities among institutions to prevent duplication:

> . . . The idea was that hospitals were expanding too much, too many beds and too many fancy capital goods, fancy kinds of equipment and so on so that the regulation was to save costs by restricting expansion. 3876a.

This power of allocation is vested, *inter alia*, in the State Department of Health and the local HSA. See Health Care Facilities Act, 35 P.S. §448.101, et seq.

Frech further testified that patients go to York as opposed to MOH because it has "a better reputation — that's not quite the right word — has a different reputation with some consumers because it's an allopathic hospital versus an osteopathic hospital." 3879a. He also testified patients may perceive they are "going to get good quality care" there. 3964-3965a.

He testified that York did not desire, and it was not in York's economic interest, to exclude any physicians, whether osteopathic or allopathic. Quite the contrary, it was in York's interest to admit as many as possible. 3872a.

Finally, he testified that, as to the services and facilities above upon which he based his opinion that York was "just a monopolist," there was nothing that York was shown to have done to prevent MOH from acquiring many of those services itself.

Hence there is no evidence whatsoever in the record that York had ever misused its supposed monopoly power. *See Clark Marine Corp. v. Cargill, Inc.*, 226 F.Supp. 103 (E.D.La. 1964), *aff'd*, 345 F.2d 79 (5th Cir.

1965), *cert. denied*, 382 U.S. 1011 (1966) (defendants' superior position brought about by skill and lawful means; plaintiff was responsible for his own failure). *Accord, California Computer Products, Inc. v. IBM*, 613 F.2d 727 (9th Cir. 1979); *Telex Corp. v. IBM*, 510 F.2d 894, 928 (10th Cir. 1975).

For all of the foregoing reasons, the verdict against York based upon monopolization under Section Two must be reversed.

B. There is No Evidence of Attempt to Monopolize as a Matter of Law.

The court concluded that York Hospital had also committed the offense of an "attempt" to monopolize, based upon the jury's Special Verdicts 26-33.

To be supported, an attempt to monopolize judgment requires record evidence that: (1) York Hospital had a "specific intent" to monopolize the market for health and hospital services; (2) conduct in support of this and evidencing this intent; and, (3) a dangerous probability of achieving monopoly power. *Swift & Co. v. U.S.*, 196 U.S. 375, 396 (1905); *Coleman Motors Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975); *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 531-32 (2d Cir. 1945); III Areeda & Turner, *Antitrust Law* §820, p. 312. *But see, Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90, 93 n. 9. (3d Cir. 1982).

As to the first, York clearly had no such "specific intent." *Human Resources Institute, Inc. v. Blue Cross of Virginia*, 498 F. Supp. 63, 67 (E.D. Va. 1980). Leaving aside all of the rebuttal evidence by defendants which disproved any such intent on the part of York, plaintiff's expert forthrightly negated any such intent: "the hospital per se, as an institution, would *like to admit all physicians, as many as possible*, get the maximum possible demand for the hospital's part." 3872a (emphasis supplied).

Similarly, of course, the conduct challenged, coupled with the Hospital's existing market position, would have to create a "dangerous probability" of achieving

monopoly power. *Swift, supra; American Tobacco Co. v. U.S.*, 328 U.S. 781, 785 (1946).

As previously discussed with respect to monopoly power, there was no proof to support a finding that York has even had substantial market power. *A fortiori*, there is none to support a conclusion York had a "dangerous probability" of achieving monopoly power.[33]

These elements are not hollow formulations. When, as here, the record conclusively shows the *absence* of any intent to monopolize; where plaintiff's own expert does not conclude that price rises by York were in furtherance of any monopoly power; where the only "exclusionary" conduct at issue is the rejection of one application for staff privileges which as a matter of law cannot further any market power by the Hospital, it is untenable to conclude that the high standards for "attempt to monopolize" have been met.

Accordingly, to the extent the judgment is based upon an "attempt to monopolize" by York Hospital, that judgment must be reversed.

C. There is No Evidence as a Matter of Law to Support a Conspiracy to Monopolize.

The third and final violation of Section Two found below is a "conspiracy to monopolize."

This requires proof of concerted action of the kind sufficient to support a Section One violation. Sullivan, *Antitrust* pp. 132-33. Such proof fails in this case. See Part IV above. Indeed, York was specifically exonerated from the Section One conspiracy — found *not* to have conspired "to impede reasonable, fair, equal or full access to staff privileges at York Hospital." Special Verdicts 11 and 13. 6247a; 6250a. How then can the Hospital rationally be deemed to have conspired "to obtain power to

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33 The court erred in instructing the jury that "dangerous probability" meant that "sooner or later" monopoly power would be achieved, which error requires at a minimum retrial of this claim. "Sooner or later" contradicts "dangerous probability." 5742a-5744a.

exclude competitors"? [34] Special Verdicts 34-36, 6271a, 6273a.

In addition, a Section Two conspiracy to monopolize requires considerably more stringent proof than a Section One conspiracy. It requires "proof of a concerted action deliberately entered into with the *specific intent* to accomplish the unlawful result of achieving a monopoly." *Sullivan, supra*, p. 132 (emphasis supplied). "[T]he critical fact to be established under a count for conspiracy to monopolize is the specific intent to monopolize." *Id.*, p. 133. *Accord, Fleer Corp. v. Topps Chewing Gum*, 658 F.2d at 153 ("specific intent to monopolize the relevant market is a necessary element of conspiracy to monopolize").

Finally, the offense requires "the commission of at least one overt act in furtherance of the conspiracy." *Sullivan supra*. There is no such act of record, other than the rejection of Weiss' application — *which was found by the jury not to have been an unreasonable restraint of trade for Section One purposes*[35] and therefore cannot, as a matter of law and common sense, be deemed an "overt act" in furtherance of the Section Two conspiracy.

For the foregoing reasons, to the extent the judgment against York was based upon a supposed "conspiracy to monopolize," that judgment must be reversed.

For all of the foregoing reasons, the judgment under Section Two of the Sherman Act in favor of plaintiff and all class members must be reversed.

VI. WEISS AND THE CLASS FAILED TO ESTABLISH A "NEXUS" TO INTERSTATE COMMERCE.

In order to bring an action under the Clayton Act by reason of violations of the Sherman Act, it is axiomatic that plaintiff must plead and prove a connection with interstate commerce. The connection must be either that the violation occurs "in" interstate commerce or that it

34. Appellants re-emphasize that in any event none of these "competitors" of York is before the Court.

35. Special Verdict No. 8, 6244a.

"affects" such commerce in a "not insubstantial" manner. *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980); *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976). In denying defendants' motions for directed verdict, judgment n.o.v. and requested jury charge, the court below erred in applying this legal precept. The Court's scope of review is thus plenary.

There have recently been four decisions rendered by district courts in this Circuit applying this general principle to the specifics of physician staff privileges denials. *See Pontius v. Children's Hospital*, 552 F. Supp. 1352 (W.D. Pa. 1982); *Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr.*, 552 F. Supp. 1170 (E.D. Pa. 1982); *Pao v. Holy Redeemer Hosp.*, 547 F.Supp. 484 (E.D. Pa. 1982); *Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr.*, 536 F.Supp. 1065 (E.D.Pa. 1982) ("*Cardio-Medical I*").

These cases establish that in any denial of hospital staff privileges case, the only relevant jurisdictional inquiry involves a determination of whether the defendant hospital's denial of staff privileges to the plaintiff physician substantially and directly affects the *plaintiff's* activities in interstate commerce. *Pontius*, 552 F.Supp. at 1361; *Cardio-Medical I*, 536 F.Supp. at 1076.

Here, there is *no evidence* of the effects of denial of staff privileges *upon the activities* of Weiss in interstate commerce. He did not attempt to prove any effects upon his purchase of drugs or other medical supplies, upon the payment of medical bills by insurers to him, or upon patients crossing state lines to see him. Similarly, there is no such evidence in the record concerning any member of the plaintiff class.

Accordingly, as a matter of law, the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably conclude that plaintiff had established a "not insubstantial" effect upon interstate commerce by reason of the alleged violations of the antitrust laws. The jury's Special Verdicts 1-4 are thus unsupported and inadequate to establish either subject matter jurisdiction or entitlement to relief under

the antitrust laws. *A fortiori*, the trial court's Findings of Fact 1-4, 6330a, 548 F.Supp. at 1051, are clearly erroneous. The antitrust judgments against the Staff and the Hospital must therefore be reversed.

In addition, the district court's charge on interstate commerce incorrectly permitted the jury to find the requisite interstate commerce based upon a test broader than that permitted under law. 5761a-5763a.

VII. DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT, A DIRECTED VERDICT, AND JUDGMENT N.O.V.

A. Summary Judgment

In June, 1981, defendants moved for summary judgment and submitted the affidavits of each of the ten individual defendants (who comprised the members of the Staff Executive Committee and the Judicial Review Committee); of Dr. Merle S. Bacastow, the Vice President-Medical Affairs of York Hospital; and of each of the sixteen members of the Board of Directors of York Hospital who voted on the application on March 19, 1979. These twenty-seven affidavits conclusively established that Weiss was not denied York Staff privileges because he was an osteopath. Rather, it appeared (Exh. D-10, 5956a-5958a) that

(1) Weiss was "unable on occasion to conduct himself in a manner that is conducive to harmonious relations with practitioners and Hospital personnel and conducive to high quality patient care," and

(2) Weiss, based upon his traits, personality, and past conduct, "would create in York Hospital an atmosphere which could be disruptive to other members of the York Hospital Medical Staff, administration, nurses and other employees, and could affect the quality of care and would not be in the best interest of the Hospital or its patients."

There is, therefore, no disputed evidence — and never has been — as to the few critical facts upon which all of plaintiff's and the class' claims are based: Weiss' status, as an osteopathic physician rather than an allopathic physician, was *not* a consideration in the individual and collective votes of the Board of Directors in rejecting his application. Nor was there any anti-competitive motive to the denial of the application. Additionally, there was substantial evidence to support the decision in the adverse reference letters challenging Weiss' "medical abilities and competence" (Exh. P-53, 5911a), reporting complaints of "incomplete exams" (Exh. P-76, 5913a), describing his lack of rapport with patients "of the lower socio-economic class" (Exh. P-52, 5909a-5910a), and asserting that Weiss' interest was "primarily in making money, 'certainly not delivering quality patient care' " (Exh. P-45, 5923a-5924a). Finally, no one other than Weiss applied for Staff privileges and was rejected.

Plaintiff, in response, submitted no credible evidence sufficient to raise a genuine issue of material fact as to the above issues, which barred his own claim. All of the class members' claims are barred as a matter of law under *Lawlor, supra*.

Therefore, the lower court seriously erred in refusing to grant summary judgment for defendants at that juncture under the settled Rule 56 standards of this Circuit and other courts, even in antitrust cases. *See First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968); *Owens v. Aetna Life & Casualty Co.*, 654 F.2d 218, 231 (3d Cir. 1981) (uncontroverted affidavits); *DeLong Corp. v. Raymond International, Inc.*, 622 F.2d 1135, 1142 (3d Cir. 1980); *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir. 1970) (en banc) ("no contradiction whatsoever . . . of Wella's affidavits denying the resale price maintenance allegation"); *Weit v. Continental Ill. Nat. Bank & Trust Co.*, 641 F.2d 457, 462 (7th Cir. 1981) (plaintiffs must produce significant probative evidence suggesting an unlawful agreement); *Program En-*

gineering v. Triangle Publications, 634 F.2d 1188, 1195 (9th Cir. 1980) (defendants denied conspiracy and proferred "legitimate business reasons . . . for each of the allegedly conspiratorial acts"). The scope of review is thus plenary.

These cases all recognize that antitrust defendants are charged with serious conduct and are entitled to deny that conduct under oath, thereby putting plaintiffs to their proof. They also recognize that defendants frequently can do no more than deny the wrongful alleged conduct because of the difficulties of proving the negative thereof. These reasons take on special force in cases, such as this one, that are tremendously disruptive to the providers of health care. However, the district court refused to consider the affidavits. 2242a, 524 F.Supp. at 437.

As Judge Cohill correctly stated in granting summary judgment for defendants in *Pontius v. Children's Hospital*, 552 F.Supp. at 1362, which concerned the termination of hospital staff privileges to a pediatric heart surgeon:

> the erroneous denial of summary judgment in a case of this sort poses grave and unusual dangers to the proper administration of health care in this nation. . . . [T]he ability of hospitals to regulate their medical staffs will be seriously impaired. . . . [T]he discovery of incompetent physicians will be rendered extraordinarily difficult.

For the foregoing reasons, summary judgment for defendants should have been granted.

B. Directed Verdict and Judgment N.O.V. Should have been Granted.

For the same reasons, defendants' motions for directed verdict made at the close of plaintiff's case in chief (4561a) and of all of the evidence (5344a) should have been granted. The scope of review is again plenary.

Further, defendants requested and the district court denied a charge to the jury that the Board of Directors is the ultimate governing body of York Hospital, so that no

cause of action under any theory could be sustained in the absence of proof of wrongful involvement by the Board of Directors in its vote on Weiss' application. 3393a.

Similarly, defendants were entitled to judgment n.o.v. on this ground. In *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d at 115-116, this Court considered at length the vital role of a directed verdict at the close of plaintiff's case in an antitrust action where, as here, all of the liability evidence was circumstantial:

> In removing a case from the jury, the court undertakes the vital task of protecting neutral principles of law from powerful forces outside the scope of the law — compassion and prejudice. . . .
> The court's role is especially crucial when, as here, the plaintiff's case, and therefore the defendant's liability, is based solely on circumstantial evidence.
>
> When a trial court grants a directed verdict in a circumstantial evidence case, the court . . . decides that no reasonable person could reach the suggested conclusion on the basis of the hard evidence without resorting to guesswork or conjecture.

VIII. THE INJUNCTION MUST BE VACATED.

The district court entered an injunction against the Hospital and Staff pursuant to Section 16 of the Clayton Act, 15 U.S.C. §26. The terms of the injunction are described in the Statement of the Case.

The injunction is unsupportable and thus must be vacated.[36]

This Court in *Mid-West Paper Products v. Continental Group*, 596 F.2d 573 (3rd Cir. 1979), emphasized that there must be "a *significant* threat of injury from an

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36. The scope of the Court's review is abuse of discretion. However, since there is no "violation of the antitrust laws", as set forth elsewhere in this Brief, the injunction must fail. 15 U.S.C. §26. In addition, the injunction runs in favor of all class members. If the class is ordered decertified, the injunction must also be vacated for that reason.

impending violation of the antitrust laws or from a *contemporary violation likely to continue or recur.*" (emphasis supplied) The Court re-emphasized the "significant threat" test. *Id.* at 594, n. 85. Here, a single osteopath has been denied staff privileges at York. Six other osteopaths have been admitted to such privileges, and one has not pressed his application (by supplying requested information). This is an improper and insufficient record to find there is "threatened" injury to the class of osteopathic physicians.

Further, injunctive relief of any kind in this Circuit requires that there be no adequate remedy at law. *Goadby v. Philadelphia Electric Co.*, 639 F.2d 117, 122 (3d Cir. 1981). Plaintiff and all class members have sued for monetary damages, and have failed to show why there is no adequate remedy at law.

In addition, the injunction entered below is overbroad, internally inconsistent, and vague and goes beyond the record. The Supreme Court has recognized the seriousness of this defect, explaining:

> the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.

Schmidt v. Lessard, 414 U.S. 473, 476 (1974).[37] The injunction here fails to comply with this standard. Paragraph 1.1 restrains and enjoins the Hospital and Staff from:

> undertaking any overt act against either Plaintiff Weiss or members of the Plaintiff Class which would in any way impede or deny the Plaintiffs full, reasonable, fair or equal access to the facilities of

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37. For the same reason, the court's finding of fact 8 is ambiguous (6330a, 548 F.Supp. at 1051). See also, *International Longshoremen's Association v. Philadelphia Marine Trade Association*, 389 U.S. 64, 76 (1967).

> York Hospital, and full, reasonable, fair or equal access to staff privileges at the York Hospital.

6340a, 548 F.Supp. at 1061.

"*Full* access" to the "facilities" and "staff privileges," read literally, may mean, and appears to mean on its face, that *all* osteopathic applicants *must* be accepted, no matter what their qualifications. An "overt act," construed literally, includes a decision to reject an application on its merits. If York cannot take any "act . . . in *any* way [to] impede or deny *full* . . . access . . . to staff privileges," then the Board of Directors can exercise no discretion or discharge its duty, mandated by state law, to ensure the best quality of patient care.

Worse yet, the injunction commands access to York's "facilities" separate from access to "staff privileges." Under this injunction, an osteopathic general practitioner can demand, in the name of "full" access to York's "facilities," to perform there complex and delicate brain surgery, even if the physician is not qualified to do it. In this and myriad other real-life possibilities, there is an inherent contradiction between "full" access and "reasonable" or "fair" access. "Equal" is meaningless without a stated standard of comparison.

As set forth above, an injunction cannot stand where its commands are so vague and sweeping, and so internally inconsistent and contradictory, that those who are restrained and enjoined cannot have a clear understanding of what they are supposed to do and not do. A remedy of civil, or even criminal contempt, is available for violation of this injunction. York must operate under the apprehension that any false step — "*any* overt act" — triggers such contempt, without any guidance as to what act is permitted and what not permitted.

The vague sweep of the injunction is ironic in view of the court's apparent intention to reject any "affirmative action."

> Furthermore, the kind of "affirmative action" which Plaintiff Weiss and the Plaintiff Class request would

> be appropriate only were there evidence of invidious discrimination. *No such evidence has been presented.*

6339a, 548 F.Supp. at 1060 (emphasis supplied). Yet the injunction appears to achieve by vagueness and overbreadth what the court found there was no basis to order specifically.

Finally, paragraph 1.3 of the injunction constitutes an unwarranted intrusion into the York medical decision-making process. At present the Staff by-laws establish a standard for certain privileges based upon one's eligibility for "examination by the appropriate American Board of Medical Specialties, or require professional training and professional credentials, equivalent thereto." [5966a, §9a]. The injunction enjoins the Hospital and Staff

> from interpreting the expression "American Board of Medical Specialty" as used in the York Hospital Medical Staff By-Laws to exclude osteopathic boards of medical specialty.

6340a, 548 F.Supp. at 1061.

There is absolutely nothing in the record upon which the lower court could determine that the standards of any specific M.D. specialty board are or are not the same as those of the D.O. board in the same specialty. Further, there is no finding by the court to support such a conclusion. In any event, the by-laws are fair because they permit any applicant, M.D. or D.O., to show equivalent qualifications.

It is precisely this entanglement in day-to-day operational decisions which the court in *Penn Central Co. v. Buckley & Co.*, 293 F.Supp. 653, 658-59 (D. N.J. 1968), *aff'd*, 415 F.2d 762 (3d Cir. 1969), held to be improper. Moreover, to the extent the court would be attempting to substitute its evaluation of the credentials of physicians for that of York, it would run counter to the holding in *Rearick v. Holstein-Friesian Ass'n.*, 472 F.Supp. 464 (W.D. Pa. 1979), and cases cited therein. *See also*,

Hoffman v. Garden-City Osteopathic, 1982-2 Trade Cases (CCH) ¶64,859 at pp. 72,273-74 (Mich. App., 1982).

Again, ironically, the Court purported not to be intrusive.

> Some of the relief [requested by plaintiff] such as amendments to the By-Laws of the York Hospital Medical Staff are grossly intrusive upon the autonomy of that body and are unjustified under the circumstances. Further, this Court is of the opinion that it has neither the technical expertise nor appropriate guidance from the parties to consider modifications of the by-laws as proposed by Plaintiff Weiss and the Plaintiff Class.

6339a, 548 F.Supp. 1060. Nevertheless, paragraph 1.3 effects a significant change of medical standards in the absence of such expertise and guidance.

For all of the foregoing reasons, the injunction must be vacated.

IX. THE JUDGMENT FOR INTERFERENCE WITH CONTRACTURAL RELATIONS IS UNSUPPORTED BY THE EVIDENCE AND MUST BE REVERSED.

The First Amended Complaint contains only a vague reference to an unspecified violation of "the common law of the State of Pennsylvania" arising out of the denial of Staff privileges. 202a. However, the lower court erroneously permitted plaintiff to submit to the jury a claim for intentional interference with Weiss' contractual relations which had nothing to do with the denial of his staff application. The claim was individual, not on behalf of a class. The jury found that the Hospital and Drs. Bauer, Butler, Deisher, and Kushner had "intentionally interfered, without proper cause," with Weiss' contracts, which was a "substantial cause of injury" to Weiss. Finding of Fact 28, 6331a, 548 F.Supp. at 1052. There is no evidence whatsoever to support that

verdict, and the resulting judgment must therefore be reversed.[38]

Following is the testimony of Weiss upon which this verdict appears to be based:

> Q What have you done when you had a patient who has presented himself with say signs that indicate they need coronary angiography.
>
> A I have cooperated fully in having them go to the York Hospital for further tests. I have recommended that they do this.
>
> Q And have you received reports back from the hospital as to whether or not they have gone over and had this procedure.
>
> A Sometimes I do and sometimes I don't.
>
> Q And do you get the patient back.
>
> A Not always.
>
> Q What happens, if you know.
>
> A Usually they're referred to another doctor on the staff. They'll go for their specialized therapy whether it be open heart surgery, whether it will be treatment for cancer, radiation treatment. And they may have had another problem that I had been taking care of like diabetes and they turn around and they refer the patient to their family practice department or to somebody else on their staff instead of back to me.

3545a.

In sum, the testimony was merely that Weiss did not "always" get a patient back, and he described what he thought were the circumstances in such cases. Those circumstances did not result from the denial of staff privileges but from the action of some unspecified "they" who "refer the patient to their family practice department or to somebody else on their staff instead of back to me." *Id.*

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38. Since the absence of a minimum quantity of evidence to support the judgment is an issue of law, the scope of the Court's review is plenary.

Nowhere does Weiss link this referral to actions by Drs. Bauer, Butler, Deisher, and Kushner. Indeed, Drs. Bauer, a general surgeon, and Deisher, an obstetrician-gynecologist, are not in such specialities as to require Weiss to refer patients to them, since the same services they perform are also available at MOH. Further, there is no evidence linking the actions of private practice physicians, whoever they may be, to York itself.

In the same fashion, Weiss never identified any particular lost patient. No patient testified. It is thus mere speculation to assume that the patients did not initiate the change by asking for the name of a different family doctor who would not give merely a "very superficial . . . examination." Exh. P-53, 5911a. Indeed, some of Weiss' patients did have such complaints and did themselves seek out new family physicians. *Id.*

Thus, Weiss' proof lacked the most basic element — the existence of a contract. The basic assumption underlying the cause of action for intentional interference with contract is that the plaintiff is in fact a party to an existing contract. *Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895, 898 (1971).[39] Further, it has long been held by Pennsylvania courts that a plaintiff can only recover for interference with contract if he proves that defendant interfered with a "known contract or business relation." *E.g., Glazer v. Chandler*, 414 Pa. 304, 308, 200 A.2d 416, 418 (1964); *Dora v. Dora*, 392 Pa. 433, 141 A.2d 587, 590 (1958).

But, as we have seen, Weiss introduced no evidence whatsoever of the existence of any specific contracts with which he claims defendants interfered, nor did he even identify any patients whom he claims to have lost as a result of defendants' conduct.

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39. Weiss did not pursue a claim for interference with prospective contractual relations. Rather, the claim addressed, and the judgment below pertains only to, interference with contractual relations existing at the time of his rejection. This Court acknowledged the distinction between the two claims in *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 898 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981).

Further, since the claim relates to existing contracts, Weiss was required, but failed, to show that the relationships he had with patients existed at the time of some specific conduct by each of the four individual defendants and the Hospital. Weiss' testimony gave no dates, just as it gave no other particulars identifying the patients or other physicians involved.

Because of this failure to prove the existence of any contracts, Weiss also failed to prove two additional elements of the cause of action. These are the defendant's "knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract," *Restatement (Second) of Torts* §766 (comment i); *See, e.g., Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618, 136 A.2d 838, 846 (1957); *General Business Services, Inc. v. Rouse*, 495 F.Supp. 526, 542-43 (E.D. Pa. 1980), as well as proof of intent to interfere, *Restatement (Second) of Torts*, §766A. *See Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895, 899 (1971).

As the foregoing establishes, the jury was left to speculate as to the existence of any specific patients or contracts, the identity of any person who may have interfered with them, the knowledge by such person of the existence of the contract, and the actual injury to plaintiff's medical practice.

Thus, the judgment for interference with contractual relations must be reversed.

X. DEFENDANTS WERE ENTITLED TO A JURY DRAWN FROM THE HARRISBURG DIVISION OF THE TRIAL COURT.

Congress has declared that all litigants "have the right" to trial before a jury "selected at random from a fair cross section of the community in the district or division wherein the court convenes." Jury Selection and Service Act of 1968, as amended, 28 U.S.C. §1861 (the "Jury Act"). In accordance with the district court's plan adopted pursuant to the Jury Act, only by a trial in Har-

risburg could a jury be drawn from a fair cross section of the parties' community and division.

The Harrisburg Division is where this action was commenced, and where defendants were entitled to be tried under 28 U.S.C. §1393(a).[40] That section provides that defendants residing in the same division of a large district are entitled to trial in that division. The section has consistently been applied to cases where multiple defendants all reside in the same division. *McCroskey v. Texas Marine Survey Co., Inc.*, 87 F.R.D. 691 (S. D. Tex. 1980); *Roark v. Bauer*, 181 F.Supp. 330 (N.D. Oh. 1960); *Lavietes v. Ferro Stamping & Mfg. Co.*, 19 F.Supp. 561 (E.D. Mich. 1937); *Barfield v. Zenith Tire & Rubber Co.*, 9 F.2d 204 (N.D. Oh. 1924); I Moore, *Federal Practice* ¶0.143[4] (2d. ed. 1980). Similarly, the statute protects a corporate defendant which is a resident of the division. *Torres v. Continental Bus System, Inc.*, 204 F.Supp. 347 (S.D. Tex 1962).

Clearly, all individual defendants are residents of York County. Similarly, York Hospital, including its Staff, maintains its only place of business there. And York County is even where the plaintiff's (and the class') entire cause of action allegedly accrued.

Pursuant to the Jury Act, the district court divided itself into divisions.[41] Jurors are drawn for service from different counties, depending upon the division in which the jury is to sit. Jurors drawn from York County serve *only* in the Harrisburg Division. Consequently, a trial by the defendants' peers drawn from a fair cross section of the community in their division could only be had in Harrisburg. In unequivocal language, Congress declared that these defendants thus "have the right" to be

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40. In denying defendants' motion for trial in Harrisburg, the district court erred in formulating and applying this legal right. This Court's scope of review is thus plenary.

41. In the Jury Act, "division" refers to the geographical portion of the district from which jurors are picked to serve at trials held in that portion of the district. 28 U.S.C. §1869(e).

tried before a jury drawn from such a cross section in Harrisburg.[42] 28 U.S.C. §1861.

This is a significant right which defendants timely claimed by pretrial motion both in writing and orally. 2568a-2575a. They objected that a jury from outside the Harrisburg Division was not representative of the community in the division and was not drawn from a community containing the diversity of minority groups who inhabit both York itself and the Harrisburg Division, but are not found in any substantial number in the rural counties from which juries in Lewisburg and Williamsport are drawn.

Defendants suffered additional prejudice by virtue of distance. Harrisburg is only about 25 miles from York whereas Lewisburg and Williamsport are at least 91 and 118 miles, respectively, from York. Almost all witnesses were from York County, and the ten individual defendants were physicians whose patients, practices, and homes were all located in York County. Even the class members were all from that county. The balance of fairness leaned overwhelmingly toward Harrisburg as the situs for trial. The district court nevertheless refused to *require* trial in Harrisburg. 2582a-2584a.

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42. Local Rule (M.D.Pa.) 407.1 incorporates the same policy that trial should only be convened at the place for holding court which is closest to the place of residence or principal place of business of the principal defendant.

CONCLUSION

For all the foregoing reasons, the judgment in the court below must be reversed in its entirety. In the alternative, these appellants are entitled to a new trial as to those issues upon which liability was found below and judgment is not reversed. In either event, the injunction must be dissolved.

Respectfully submitted,

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MEMBERSHIP IN THE BAR OF THE COURT

It is hereby certified that Stuart H. Savett, Esq., David H. Weinstein, Esq., Robert J. LaRocca, Esq., and Robert J. Brown, Esq., are members in good standing of the Bar of the Court.

/s/ DAVID H. WEINSTEIN

COMPENDIUM OF STATE LAW CONCERNING DISCRIMINATION IN STAFF PRIVILEGES

ARKANSAS:

In *Ware v. Benedict*, 280 S.W. 2d 234, 225 Ark. 185 (Ark. 1955) the court held that a hospital cannot deprive a physician of his right to practice by rules, regulations or actions that are "unreasonable, arbitrary, or capricious."

CALIFORNIA:

Section 2453 of the California Business & Professional Code (West 1985 Supp.) states that there shall be no discrimination in granting staff privileges on the basis of whether a physician holds an M.D. or a D.O. degree. *See also, Rosner v. Eden Township Hospital District*, 25 Cal. Rptr. 551, 58 C.2d 592, 375 P.2d 431 (Cal. 1961).

COLORADO:

Colorado Rev. Stat. Section 25-3-103.5 (1984 Supp.) provides that hospitals shall not discriminate in granting staff privileges on the basis of whether the physician holds an M.D. or a D.O. degree. *See also, Newton v. Board of Commissioners of Weld County*, 282 P.2d 1068, 86 Colo. 446 (Colo. 1929).

FLORIDA:

Fla. Stat. Ann. Section 395.011 (West Supp. 1984) provides that hospitals may not discriminate between M.D.s and D.O.s in acting on an application for staff membership.

HAWAII:

Hawaii Rev. Stat. Section 460-11 (1976) precludes discrimination between osteopathic and allopathic physicians in "public institutions."

INDIANA:

Ind. Code Ann. Section 16-12-21-33 and Section 16-12.1-5-1(b) prohibit discrimination between osteopathic physicians and allopathic physicians in granting staff privileges.

IOWA:

Iowa Code Ann. Section 347.18 (1983) provides that county hospitals may not discriminate between practitioners of any school of medicine.

KANSAS:

Kan. Stat. Ann. Sections 14-612 and 19-1813 (1975 & 1981) prohibit discrimination based on medical degree by city and county hospitals.

MARYLAND:

State v. Good Samaritan Hospital of Maryland, 473 A.2d 892 (Md. 1984) prohibits discrimination between medical providers based on academic degree.

MICHIGAN:

Mich. Comp. Laws Ann. Section 331.163 (1980) provides that osteopathic physicians may not be excluded from county hospitals. *See*, Op. Atty. Gen. 1976, No. 5049, p. 534.

MISSOURI:

Mo. Ann. Stat. Section 205.300 (Vernon 1983) provides that county hospitals may not discriminate against osteopathic physicians. *See also, Stribling v. Jolley*, 253 S.W. 2d 519, 241 Mo. App. 1123 (Mo. Ct. App. 1952).

MONTANA:

Mont. Code Ann. Section 50-5-105(2) makes it unlawful for hospitals to discriminate among the patients of licensed physicians, including osteopathic physicians.

NEVADA:

Nev. Rev. Stat. Section 450.430 (1983) prohibits discrimination against osteopathic physicians.

NEW JERSEY

By case law, discrimination in the granting staff privileges between osteopathic physicians and allopathic physicians is prohibited. *See*, *Greisman v. Newcomb Hospital*, 192 A.2d 817 (N.J. 1963).

NEW MEXICO

N.M. Rev. Stat. Ann. Section 61-10-14 (1981 Supp.) provides that osteopathic physicians shall have rights equal to physicians and surgeons of all other schools of practice.

NEW YORK

N.Y. Pub. Health Law Section 2801-(b)(1) (McKinney 1977) prohibits denial of privileges for reasons "unrelated to standards of patient care, patient welfare, the objectives of the institution or character and competency of the applicant."

OHIO:

Ohio Rev. Code Ann. Section 3701.351(b) (Page 1983) prohibits hospitals from denying staff privileges based on the fact that the applicant is an osteopathic physician.

PENNSYLVANIA

28 Pa. Admin. Code Section 107.2 and 107.3(c)(1984) provides that no applicant shall be denied medical staff privileges on the basis of any criterion lacking professional or ethical justification.

RHODE ISLAND

R.I. Gen. Laws Section 5-36-3 (1976) holds that osteopaths are entitled to equal privileges.

SOUTH CAROLINA

S.C. Code Ann. Section 44-7-770 (1977) prohibits discrimination against osteopathic physicians by county, township and municipal hospitals.

SOUTH DAKOTA

S.D. Codified Laws Ann. 34-8-8.1 (1984 Supp.) prohibits discrimination in the granting of staff privileges "between licensed practitioners of the various healing arts."

TEXAS

Tex. Rev. Civ. Stat. Ann. Art. 4495(b), Section 3.06(a) (Vernon 1985 Supp.) prohibits discrimination "against a school or system of medicine."

VIRGINIA

Va. Code Section 32.1-134.1 (1979) prohibits denial of staff privileges unrelated to standards of patient care.

WEST VIRGINIA

W. Va. Code Section 30-14-9 provides "osteopathic physicians and surgeons licensed hereunder shall have the same rights and privileges as physicians and surgeons of other schools of medicine."

WYOMING

Wyo. Stat. Section 32-2-113 (1984 Supp.) provides that any hospital whose support is derived in whole or part from public funds may not discriminate against doctors of osteopathy.

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No. 84-1187

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE MEDICAL AND DENTAL STAFF
OF YORK HOSPITAL,

Petitioner,

v.

MALCOLM WEISS,

Respondent.

ON PETITION FOR
A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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I. Introduction.

In an effort to support the unprecedented analysis and conclusions of the court of appeals and underplay the significance of the court's decision, Weiss resorts to fanciful distortions of the record. Weiss, for example, attempts to portray York Hospital's processing of his application as a "witch hunt" directed at osteopaths. This is belied by the uncontradicted evidence that every other osteopath who applied to York Hospital was granted staff privileges and by the concerns about Weiss's professional competence and ability to work with others that surfaced in Weiss's reference letters. *See* Pet. at 4-7.

In an effort to refute that this is the first case to find a hospital staff privileges decision to be a violation of section 1 of the Sherman Act under a per se theory or otherwise, Weiss lamely suggests that *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), also was such a case and that it did not chill meaningful physician participation in the staff privileges process.[1] RB at 9-12. *American Medical Ass'n* has nothing to do with the issues herein.[2] Antitrust liability in that case was not predicated upon a hospital's

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1. Weiss also argues that the court of appeals' decision will not encourage meritless claims because the cost of antitrust litigation and Federal Rules of Civil Procedure 11 and 56 will act as "prophylactics" against such claims. RB at 12-13. Weiss misses the point. Because of the court of appeals' decision, every disappointed staff privileges applicant (and his or her attorney) will know that an antitrust suit will not be disposed of before trial and that the burden of proof at trial has been substantially eased. *See* Pet. at 14-15. This knowledge (and the enhanced prospects of recovery, settlement, and attorneys' fees) can only encourage antitrust challenges to staff privileges decisions.

2. In *American Medical Ass'n*, two separate corporations were found and shown to have conspired to destroy a competitor, an offense the corporations conceded was supported by substantial evidence. *American Medical Ass'n*, 317 U.S. at 532-33. The only issue in that case was whether the conceded restraint was of "trade" within the meaning of the Sherman Act.

staff privileges decision; there was no finding of per se liability; and there was no holding that the activities of a hospital medical staff automatically satisfy the concerted action requirement of section 1 of the Sherman Act.

Weiss also argues this case is not like *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 77 (1984) (No. 83-1368), in which this Court will review whether per se antitrust liability can be imposed without analysis of the purpose or effect of the alleged restraint. Weiss does not dispute that, as in *Northwest Wholesale Stationers, Inc.*, there was no analysis by the court of appeals, and no supporting evidence, of any pernicious, adverse effects on competition.[3] But Weiss argues that the facts herein fit the description of a "group boycott" and can conclusively be presumed to have anticompetitive effects.[4] RB at 24-26. This, however, was the same reasoning used by the Ninth Circuit in *Northwest Wholesale Stationers*,

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3. The court of appeals never examined whether the alleged exclusion of osteopaths from York Hospital would have any effect on the price, quantity, or quality of medical services provided in York County. It was in this context that the York Medical Staff noted the economic distinctiveness of the health care industry. *See* Pet. at 24-25. Because of the economic peculiarities of the health care industry, the alleged exclusion of osteopaths from York Hospital will not have the anticompetitive impact "normally" associated with such exclusionary conduct (i.e., effects on the price, quality, or quantity of medical services), and it makes little sense to apply the "normal" per se rule. *See also Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551, 1566-69 (1984).

4. The only anticompetitive effect ever claimed by Weiss — injury to osteopaths by virtue of their alleged exclusion from York Hospital — is not the type of anticompetitive effect that justifies Sherman Act scrutiny. As this Court has repeatedly "made clear," the "antitrust laws . . . were enacted for the 'protection of *competition*, not *competitors*.'" *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2740 n.14 (1984) (emphasis in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

Inc., the propriety of which is now being reviewed by this Court.[5]

Weiss also challenges certain of the legal arguments in the petition. As demonstrated below, Weiss's analysis is inaccurate.

II. The York Medical Staff cannot automatically be deemed an antitrust combination.

Weiss argues that because each physician member of the York Medical Staff is an "independent economic entity," the York Medical Staff is conclusively "deemed to be a combination . . . within the ken of Section 1." RB at 22. Weiss also suggests that the York Medical Staff's concerted action argument rests solely on the "legal conceptualization" that the members of the York Medical Staff were required to act as agents for the benefit of York Hospital, an approach that purportedly was rejected by this Court in *Copperweld Corp.* RB at 20-21. Weiss's analysis mischaracterizes the York Medical Staff's position, the decision in *Copperweld Corp.*, and the "independent personal stake" exception to the intra-enterprise conspiracy doctrine.

The York Medical Staff's argument is that: in performing credentialing functions, the members of the York Medical Staff were required to act on behalf of and for the benefit of York Hospital; there was no finding or evidence that they acted otherwise; and, accordingly, there was no concerted action by the members of the York Medical Staff in this case. The York Medical Staff does not suggest that members of medical staffs cannot conspire with each other in any circumstances. But neither does the law afford Weiss the conclusive presumption of concerted action that the

5. Contrary to Weiss's suggestion, the York Medical Staff is not arguing that all group boycotts should be judged under the rule of reason; its position is that mechanistic extension of the per se rule, unsupported by any economic analysis, is contrary to decisions of this Court. *See* Pet. at 23-25.

court of appeals has given him.[6] Instead, under the "independent personal stake" exception, Weiss has the affirmative burden of establishing that, while participating in York Hospital's credentialing process, particular physician members of the York Medical Staff acted for their own economic interests and outside the interests of York Hospital.[7]

Weiss does not dispute that there was no such evidence or that, as to the only identified participants in the credentialing process (the ten individual physician defendants), the jury specifically found they had not acted for their personal interests or in their individual capacities. *See* Pet. at 10-11, 19-20. These defects cannot be cured through a conclusion of law that, because the physician members of medical staffs (being "independent economic entities") may, in certain other circumstances and at certain other times, have an "independent personal stake," all medical staffs, therefore, are automatic antitrust combinations.

Weiss also erroneously suggests that *Copperweld Corp.* renders irrelevant, for purposes of the concerted action inquiry, whether an agent is acting for his own benefit or in the interests of his principal. RB at 21. *Copperweld Corp.* itself preserves and relies upon the concept of "benefit" in holding that a wholly owned subsidiary, which "acts for the benefit of the parent," cannot conspire with its parent. *Copperweld Corp.*, 104 S. Ct. at 2742.[8]

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6. Inasmuch as physicians with staff privileges are required by federal and state law to join medical staffs and to participate in the staff privileges decision-making process on behalf of their hospitals, *see* Pet. at 7-9, it is inconsistent to presume conclusively that in so doing members of medical staffs are acting in their own interests.

7. Contrary to Weiss's implication, defendants did not have the burden of disproving the existence of an "independent personal stake" or of affirmatively proving they acted in the interests of York Hospital. Concerted action is an element of Weiss's case and, as such, the burden rested upon him to prove it. *See* Pet. at 19-20.

8. Similarly, Weiss's citation of *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), is inapposite. This Court in *Hydrolevel Corp.* held only that a principal could

III. York Hospital unilaterally made all staff privileges decisions.

In its petition, the York Medical Staff argued that, because York Hospital was the ultimate decision maker in the staff privileges process and was found by the jury not to have conspired with anyone, the concerted action requirement of Sherman Act section 1 cannot be satisfied.[9] Pet. at 21-22. Weiss questions the factual predicate of this argument by suggesting that York Hospital "delegated all [staff privileges] decision making responsibility" to the York Medical Staff.[10] RB at 2, 18.

It is not necessary for this Court to become involved in the factual imbroglio whether the York Medical Staff or York Hospital had the power to make staff privileges decisions. The jury resolved this issue against Weiss by specifically finding that the York Medical Staff had "no power" to exclude competitors. *Weiss v. York Hospital*, 548 F. Supp. 1048, 1052 (M.D. Pa. 1982) (Finding of Fact No. 14). (A-100).

NOTES *(Continued)*

be liable for the antitrust violations of its agents acting with apparent authority; no conspiracy issue was presented or decided in that case.

9. Contrary to Weiss's contention, the record is replete with evidence that York Hospital's lay Board of Directors made all staff privileges decisions. (3811a; 5956a; 5959a-5970a; 5979a-5980a). Even if this were not in the record, defendants nonetheless would be entitled to a presumption (which was never rebutted by Weiss) that they complied with all applicable laws and regulations, which require York Hospital to be the decision maker. *E.g., National Labor Relations Board v. Shawnee Industries, Inc.*, 333 F.2d 221, 225 (10th Cir. 1964).

10. Weiss again does so by distorting the record. For example, Weiss quotes testimony that "the endorsement by the Medical Staff Committee virtually amounts to an endorsement by the Board" as supporting his proposition that the York Hospital Board of Directors served as a rubber stamp for decisions by committees of the York Medical Staff. RB at 18-19. By deleting half of the answer and quoting this testimony out of context, Weiss conceals that the "Medical Staff Committee" referred to in the testimony is a committee of the York Hospital Board of Directors, not a committee of the York Medical Staff.

IV. The unprecedented application of a per se rule to a hospital's staff privileges decision is legally unsupportable.

Weiss argues that this Court should not grant certiorari to review the York Medical Staff's per se arguments for three reasons.[11]

First, Weiss argues that the York Medical Staff did not preserve the per se issues below. RB at 13-14. Neither Weiss nor defendants extensively briefed the per se issues in the court of appeals because the court of appeals unexpectedly converted what the parties had mutually viewed as a rule of reason case into a per se case. The York Medical Staff's petition for rehearing in the court of appeals was, accordingly, the first opportunity the York Medical Staff had to brief the per se issues, and those issues were fully presented and preserved in that petition.

Second, Weiss disingenuously claims that the court of appeals' adoption of a per se rule was unnecessary to its decision because there is liability under the rule of reason. RB at 13-15. Applying the rule of reason, the jury found that any conspiracy to deny Weiss staff privileges was *not an unreasonable restraint of trade*. Jury's Response to Special Verdict Question No. 8. (6244a). Thus, as to Weiss, application of the rule of reason, instead of a per se rule, compels reversal of the court's finding of a violation of section 1 of the Sherman Act. This is particularly significant because the class's entire case is based upon the alleged discriminatory treatment of Weiss's staff privileges application and because Weiss (as the only osteopath who had ever applied for and been denied staff privileges at York Hospital) is the only osteopath who can even arguably state

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11. Weiss does not dispute that hospital staff privileges decisions are a form of industry self-regulation and that this Court's decision in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), therefore, compels use of the rule of reason.

a claim for damages as a result of the conduct challenged herein.[12]

Third, Weiss argues that this record contains no credible evidence of procompetitive justifications and that, therefore, this is a factually peculiar case. RB at 26-30. Yet, like Weiss, the plaintiffs in all staff privileges cases argue the absence of credible procompetitive, quality of care justifications supporting adverse staff privileges determinations. *See* Pet. at 3 n.2. The unique feature of this case is the court of appeals' unprecedented willingness to ignore the procompetitive justifications of record (and the absence of anticompetitive effects) and to adopt a per se rule. *See, e.g., Weiss v. York Hospital*, 745 F.2d 786, 797 n.18 (3d Cir. 1984) (A-18); Pet. at 4-7, 25-26; 4602a-4604a; 4744a-4745a; 5240a-5241a; 5893a-5894a; 5898a-5899a; 5909a-5913a; 5923a-5924a; 5956a-5958a; 5987a-5992a; 5995a-5999a; 6001a-6002a.

Assuming *arguendo* there had been evidence of anticompetitive effects, the task of weighing the credibility of the evidence and of balancing procompetitive effects against anticompetitive effects would be for the jury in the context of a rule of reason analysis. It is not a matter for the appellate courts in the context of fashioning a per se rule. *See Wilk v. American Medical Ass'n*, 719 F.2d 207, 221 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398, 2399 (1984).[13]

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12. In its petition, the York Medical Staff also argued that the section 1 verdict in favor of the class could not be sustained under the rule of reason in light of the jury's finding that the York Medical Staff had no power to exclude competitors and the absence of any evidence that the practices or policies of the York Medical Staff had any effect on consumers. *See* Pet. at 27 n.30. Weiss does not dispute these arguments.

13. Weiss's claim that the jury has already rejected defendants' arguments regarding Weiss's professional competence and character is spurious. RB at 30 n.36. The court of appeals expressly held that "we cannot deem the issue of Weiss' professional competence and character as a defense to his claim for damages concluded," *Weiss*, 745 F.2d at 824 (A-79), and entered judgment accordingly. (A-130). Because Weiss has not cross-petitioned for certiorari on this point, he is foreclosed

V. The York Medical Staff's interstate commerce argument was presented to the court of appeals.

Weiss does not and cannot dispute that there is a circuit conflict as to the application of the "affecting interstate commerce" test. Nor does Weiss dispute that there is no evidence to establish the jurisdictional and substantive requirement of a "nexus" between any alleged antitrust violation and interstate commerce.

Weiss argues only that this Court should not resolve the circuit split, or correct the error of the court of appeals, because the York Medical Staff did not raise this interstate commerce issue below. Contrary to Weiss's argument, the precise issues presented to this Court were briefed and argued in the court of appeals:

> First, there was no evidence that any defendant other than York Hospital itself had any connection with interstate commerce. . . .
>
> . . . .
>
> [T]here is a total absence of evidence sufficient to establish the jurisdictional and substantive requirement of a "nexus" between any alleged violation and interstate commerce. Accordingly, the antitrust judgment against York [Hospital] and the [York Medical] Staff should be reversed . . . .

Brief for all Cross Appellees and Reply Brief for Appellants York Hospital, Medical and Dental Staff of York Hospital, Thomas L. Bauer, Ivan L. Butler, Samuel W. Deisher, and Lois M. Kushner at 38-39, *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984).[14]

NOTES *(Continued)*

from asserting it. *E.g., Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613, 620-21 n.14 (1985).

14. In addition, the absence of an effect on interstate commerce goes to the subject matter jurisdiction of the federal courts and, therefore, can be raised at any time.

VI. Conclusion.

For the foregoing reasons, as well as the reasons set forth in the petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Dated: March 1, 1985

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